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Tiivistelmä - Referat – Abstract

This thesis is concerned with the predictability of the fair and equitable treatment (FET) standard. The aim is to understand the North American approach to international investment arbitration, especially how the FET standard has been interpreted and applied.

Today, most Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) contain a clause on Investor-State Dispute Settlement (ISDS). ISDS allows disputes between foreign investors and the host country to be settled through international investment arbitration (IIA). In the last 20 years, investment disputes resolved through ISDS have increased substantially. Despite its growing popularity, ISDS clauses have not gone without their fair share of public critique. In Europe, the criticism against IIA culminated during the discussions on whether to include an ISDS clause in the Transatlantic Trade and Investment Partnership (TTIP). There was a fear that American investors would be able to influence European regulators by threatening them with costly proceedings through the ISDS clause. This has been referred to as causing a “regulatory chill” on legislative initiatives.

Integral in the critique of ISDS is the assumption that proceedings in international investment arbitration are somehow biased towards investors. While this is by no means true statistically, the vagueness of investment protection standards, such as the FET standard, are often used as an example of the unpredictability of the whole system. Allegedly, host states are forced to settle the dispute as they perceive IIA as unpredictable. It is therefore the unpredictability of the investment protection standard that is the main driver behind the critique against the whole system.

The thesis draws its theoretical inspiration from Critical Legal Studies in an attempt to meet the critique in the same theoretical framework. The objective of the theory is to discern the legal culture in which investment awards are given. By familiarizing with this culture, I postulate that there are patterns of behavior that, once known, increase the predictability of IIA as a whole. With regards to the FET standard, I argue that its predictability is determined by how readily an impartial person could recognize a violation of the standard. The analysis is limited to this standard, because of its prominent status in investment disputes. It is by far the most popular standard on which investors base their claims. The standard has been criticized because of its vagueness, which allegedly gives the arbitrators too much discretion in deciding the investment disputes. The analysis of the predictability of the FET standard can thus be seen as a representation of the predictability of the system as a whole.

The focus of the analysis is limited to investment disputes decided under chapter 11 of the North American Free Trade Agreement (NAFTA). It functions as a representation of the North American interpretation of the standard and provides for an excellent example of how investment arbitration can be used efficiently between developed economies. This thesis takes a qualitative approach to the question as the focus of the analysis is on a handful of prominent NAFTA chapter 11 awards.

The analysis is divided into the interpretation and application of the FET standard. The analysis of the interpretation focuses on the theoretical argumentation on which Tribunals have supported their awards. Here, the main conclusion is that the FET standard is considered part of the customary international law minimum standard of treatment of aliens, also referred to as “CILMSTA.” There is a test that most Tribunals use to determine whether acts of host states reach this standard. The test aims to reflect the actions of the state with the likely reaction of impartial persons and to determine whether this body of people would be “outraged” or “shocked” at the actions of the state. The chapter on the application of the standard is a more concrete approach. When applied, the standard is not used as such, but is actualized through one of its subsequent elements. If one or many of the elements can be considered to satisfy the test of “outrage” or “shocking”, then there has been a violation of the FET standard. As it becomes evident throughout my survey of prominent awards, Tribunals are cautious of finding a violation of the standard. The threshold for breaching the standard is high, and it is only in exceptionally pronounced cases where the requirements of the test have been met.

In conclusion, it is evident that most Tribunals reflect the actions of the state to the reaction of an average impartial person. Tribunals are mostly conscious of the fact that a violation of the standard should be predictable and thus representative of a broader understanding of fair and equitable treatment in customary international law. In the interest of correcting false perceptions that many concerned state actors may have, this thesis hopes to contribute with a nuanced perspective of the predictability of the FET standard in North American investment arbitration.

Avainsanat – Nyckelord – Keywords
Fair and equitable treatment, predictability, Investor-state dispute settlement, North American Free Trade Agreement, International Investment Arbitration, International Centre for Settlement of Investment Disputes, Bilateral Investment Treaty, Article 1105, Minimum standard of Treatment, legal culture, ICSID, NAFTA, BIT, ISDS, FET standard, IIA.

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Is the interpretation and application of the "fair and equitable treatment" standard predictable?

An insight into the legal culture of NAFTA Chapter 11 investor-state disputes

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Abbreviations

BITs	Bilateral Investment Treaties
CETA	Comprehensive Economic and Trade Agreement
CILMSTA	Customary international law minimum standard of treatment of aliens
ECOSOC	United Nations Economic and Social Council
EU	European Union
FCN	Friendship, commerce and navigation
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free Trade Agreement
FTC	North American Free Trade Commission
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Arbitration
ISDS	Investor-state dispute settlement
MFN	Most-favored-nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

"Laws and statutes become more or less powerless as long as they are not borne in the hearts of men by an honest will and of a mind that puts the love and righteousness above selfishness. It is in the hearts of the people that the foundation must be laid for peace and mutual trust both within society itself and among the people. Nothing can better serve unity than when people are embodied by high goals that they through a self-sacrificing industriousness and a serious devotion to their thoughts and their lives are aiming at realizing."[1]

[1] Speech by King Gustaf the V[th] at the church meeting in Stockholm, 1925. The original speech was made in Swedish: *Lagar och förordningar bliva mer eller mindre vanmäktiga så länge de icke i människornas hjärtan uppbäras av en ärlig vilja och av ett sinnelag, som sätter kärleken och rättfärdigheten över självviskheten. Det är i människornas hjärtan som grunden måste läggas för fred och ömsesidigt förtroende såväl inom samhället självt som folken emellan. Ingenting kan bättre tjäna enheten än att människor besjälas av höga mål och med självuppoffrande nit och allvar ägna sina tankar och sitt liv åt att förverkliga dem.*

1 Introduction

Facing one of the world giants in international arbitration, the small Finnish legal team representing their clients in an investment dispute firmly insisted on an adherence to a principle of fair dealing. In his closing remarks, the lead council exclaimed that: "*In Finland, we have this thing called 'reilu meininki'*"(transl. "fair dealing").[2] While the phrase was a direct citation from a Finnish sausage commercial, the concept of *reilu meininki* could also be used as a reference to a broader principle concerning the fair and equitable interaction between the parties to an investment relationship. As with any general principles or standards, the main problem is whether they can be applied predictably. The most vocal opponents to international investment arbitration (IIA) argue that the vagueness of the standard makes its interpretation and application unpredictable, something that allegedly benefits foreign investors. As the title already suggests, the object of this thesis is to find out whether the fair and equitable (FET) standard represents a prevailing and predictable worldwide practice that a Finn would call *reilu meininki.*

My initial contact with the field was back in 2015 when the discussion about the Transatlantic Trade and Investment Partnership (TTIP) was an issue of the public debate. At that time, one of the most controversial aspects of the TTIP negotiations, besides the infamous chlorine-chickens, was the Investor-state dispute settlement (ISDS) clause that was to be included in the agreement.[3] Eventually, the negotiations between the EU and the US failed due to the public outcry. The failure of the TTIP negotiations is not definitive, and it is very likely that a new version of the agreement will be drafted shortly.[4] Moreover, to alleviate future disagreements, a new agreement will have to include clauses on how disputes between investors and states will be settled. One possibility, which was already suggested by the Trade Commissioner during the TTIP negotiations, is that a permanent tribunal would be established to handle cases that are exclusively restricted to the agreement. [5] The question of how to improve the system to give it a better reputation is a widely discussed topic. While this will not be the topic of my thesis, it should be noted that the FET standard is an inherent part of contemporary international investment law.

[2] Interview with Lindfors (2017).

[3] See for example: Reuters, 14 July 2014.

[4] Deutsche Welle, 27 June 2017

[5] European Commission, 16 September 2015. Such a system has already been established in connection with EU-Canada free trade agreement, Comprehensive Economic and Trade Agreement (CETA).

Whatever the future attempts of reform will bring to how we settle disputes between investors and states and however the new changes will affect formulations investment protection clauses in future trade agreements, *the underlying idea with the standard of protection will still most likely remain the same.*

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The FET standard constitutes one of the leading investment protection standards through which ISDS claims are made. The primary opponents of an ISDS system argue that investors will be able to use the threat of a possible claim as leverage against domestic policy changes which in turn creates a *regulatory chill* on legislative initiatives. The opponents base this claim on the presumption that the investment standards applied in trade agreements are *unpredictable,* which makes it possible for investors to benefit from the uncertainty of the standard by using it as negotiation leverage.

It is especially important to understand North American way of interpreting the FET standard since this standard would most definitely be included in a possible future free trade agreement between the US and EU. We are seeing a development towards a balancing of the ISDS mechanism in the sense that it is being applied to investment relationships between parties that have traditionally been seen as capital-exporting states. The old view of International Investment Arbitration (IIA) functioning primarily as a tool for the North to protect its investments in the South is slowly disintegrating as the mechanism is increasingly used in North-North investment relationships too.[6] In this situation, a comprehensive understanding of what the "northern" standard entails would substantially increase the predictability of a future FET clause in a free trade agreement.

In the following two subchapters, I will further elaborate on the problem and impact that lies at the core of this thesis. The chapter concerning the problem considers the critique that has been directed against the ISDS system in general and the FET standard in particular. The problem is based on the idea of a "regulatory chill." In turn, the regulatory chill has its roots in the unpredictability of the FET standard due to its alleged vagueness.

The subchapter that focuses on the impact is mostly connected with the problem. As the problem is primarily concerned with the vagueness of the FET standard, in status quo, this hurts public administration and judicial activity (if we take the threat of the regulatory chill

[6] A recent example of this is the ratification of CETA, which contains both the FET standard and an ISDS clause

to its fullest extent). However, the ideal aim of the thesis would be to change the impact by providing the relevant authorities, including policy actors, administrative workers and judges, with a comprehensive familiarization of the "legal culture" in which the standard has been interpreted and applied in. Trough this, the thesis would illuminate the unpredictability connected with the FET standard, which the regulatory chill is mostly predicated on, and consequently create a much-needed understanding of the standard.

1.1 Problem

It is crucial to look at the critique that has been directed at investment arbitration and the presumptions about the unpredictability of the FET standard. The problem with the critique is that it is inherently political. It is impossible to resolve the underlying political differences with a strictly jurisprudential approach.[7] Here, I use the (political) critique as a way to navigate my way to the weaknesses in the system.[8] Through this, I hope to be able to contribute with an answer that is facilitated by the same theoretical foundation as the critique. This will become clearer in my theoretical part, where I expand further on the relationship between understanding the legal culture of the system and the predictability of the FET standard.

The core criticism against ISDS clauses contained in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) boils down to injustice. There is a stigma against arbitral proceedings. The fact that the parties appoint arbitrators does not induce the same institutional confidence that international and domestic courts enjoy. There is a perception that multinational corporations privatize justice, and that these corporations will be able to impose a regulatory chill on the state's ability to legislate by fear of claims for damages that reach the millions.[9]

More specifically, vigorous criticism has been directed at the FET standard since it is worded in such a broad and vague manner, which allegedly grants arbitrators close to unlimited power to review sovereign acts of states, which inevitably affects its

[7] For more on this discussion, see Niemelä (2017).

[8] With "system", I am referring more generally to the area of international investment law, and more in particular, to the dispute settlement mechanisms connected to it.

[9] For more on the critique against the ISDS system as a whole, see for example: Koskenniemi (2017), Sornarajah (2015), Van Harten (2007) and Cheng (2005).

populations.[10] This is mainly the argument in favor of the regulatory chill.[11] The regulatory chill that the ISDS clauses have on domestic legislation constitutes an imbalance in the relationship since the investor is always able to play his trump card, namely "see you in court."[12] There is a suspicion that international arbitration is somehow "dis-embedded" from the domestic political communities. [13]

The regulatory chill argument is based on two assumptions. First, that the investor can influence domestic legislation by threatening with "dragging the matter to court." When states enter BITs, surely they do so with the knowledge that if they were to breach an article of the treaty, this breach might lead to a dispute settlement procedure. To suggest that this is in itself is causing a regulatory chill on future domestic legislation is a bit of a stretch. We need to keep in mind the fact that the primary reason for concluding BITs (including other tools such as multilateral and free trade agreements) is the assumption of an increased flow of foreign direct investment (FDI).[14] You cannot have your cake and eat it too. Therefore, what I interpret as the real regulatory chill is the possibility that the investor uses the threat of ISDS as an always-existing bargaining tool, by utilizing the vagueness of the standard. This seems more feasible. But is this the case?

To answer this question, I need to tackle the second assumption behind the regulatory chill argument. The second assumption is that international investment tribunals are inherently biased towards investors in the application of the FET standard. [15] For the mere existence of ISDS clauses to have a regulatory chill on states domestic legislation, it is logical to think that the proceedings at an investment tribunal can be seen as a sort of risk-taking or even gambling. Once again, the contracting parties have agreed to the terms in the investment treaty, and should objectively look at the conditions that they have agreed to like something which is compatible with their domestic legal system as well as future

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[10] Van Harten (2007), page 88-90. Sornarajah (2015), page 248.

[11] More on the regulatory chill, see Niemelä (2017), page 253-262.

[12] Koskenniemi (2017), page 351. Koskenniemi talks about the inherent flaw in investment arbitration, and that its mere existence constitutes an imbalance in the relationship

[13] "*The main issue is really not about whether to decide in favor of investor interests or countervailing values. It is instead, whether to "protect the autonomous power of domestic political communities or to let the conditions of local lives be decided in the ('dis-embedded') processes of economic globalization." Ibid*., page 352.

[14] There is a debate whether this is really the case, see for example: Egger & Pfaffermayr (2004) and Hallward-Driemeier (2003)

[15] See further, Van Harten (2007), page 167-169.

conventional legal reforms. Therefore, one could assume at the outset that the FET is interpreted and applied according to the ordinary meaning of the parties. However, for the chilling argument to remain standing, international investment tribunals have to apply the FET with an unfair bias towards protecting investor rights over state interests.[16] A thorough empirical study of the underlying motivations of arbitrators is excluded from this thesis. However, I argue that the second assumption is denied if the predictability of the FET standard can be established. Here, I claim that arbitrator's motivations should be inferred from the outcomes of the cases.[17] One might argue that bias towards investor's rights and predictability are not necessarily mutually exclusive.[18] However, the motivations of arbitrators are of no interest if it is evident that the motives do not affect the outcomes. Since an observer can only conclude on the motives of arbitrators based on material things, the focus needs to be limited to such material things and actions that are relevant so not to risk resorting to arguments that are not based on anything else than a *presumption* of the arbitrator's motives.[19] Therefore, I focus on the predictability of the FET and draw following conclusions on the motivations of arbitrators solely based on the finding of the central question.

The best approach is, therefore, to analyze the FET standard at face value, approaching it with good faith and only drawing conclusions on predictability and motivations based on the observable outcomes of cases.[20]

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[16] This argument is not supported when looking at statistics from ISDS proceedings, which show that 37% of the disputes are won by States while the corresponding percentage for investors is 27%. However, it needs to be noted that 24% of the cases have been settled, which still affords the critics some leeway. See: Investment Policy HUB (2017).

[17] This is based on a Jungian idea on how to discern a person's motivations. The theory is that if the motivation is unclear, it should be inferred from the actions and the results that these actions lead to. For the purpose of argument, let's say that the arbitrators concluded their awards in favor of the investor 90% of the time. Whatever the proclaimed motivations are, there exists a strong case in assuming that the arbitrators in general are biased towards investors.

[18] This is the case, since arbitrators can consistently and in a predictable manner decide cases in favor of investors. Although it needs to be mentioned that experts in the field agree that most arbitrators take their role very seriously without giving any undue regard to the appointing party. Interview with Lindfors (2017) & Möller (2017).

[19] This excludes arguments about the arbitrator's motivation that include his or her sense of justice or fairness. However, it also excludes arguments about such motivations that pertain to social status or personal wealth, including arguments that connect the arbitrator's motivation to that of reappointment. Van Harten (2007), page 167-169.

[20] This is to say that we exclude presumptions on underlying motives. This is contrary to the assertions of many authors that argue that we need to critically analyze the system as a whole and not "accept" the system by analyzing its application of the law. See further: Sornarajah (2015), page 248 and Koskenniemi (2017), page 349.

1.2 Impact

An essential aspect that needs to be considered is the broader context in which the thesis is being produced. As I have already explained in the beginning, it is very likely that the EU and the US will try re-negotiating the failed TTIP agreement. The TTIP is by no means the only FTA that would include the FET standard in the investment relations between developed economies. It has already been included in the FTA between Canada and the EU, the Comprehensive Economic and Trade Agreement (CETA), which entered into force last year.[21] It is especially important to understand the Northern American stance on the interpretation of the FET standard, as there is an apparent shift towards more regulation on the investment relationship between the two continents. We are seeing a development towards a balancing of the ISDS mechanism in the sense that it is being applied to investment relationships between parties that have traditionally been seen as capital-exporting states.[22] In a new FTA, US investors would be able to bring claims against EU states, including FET claims, which are substantially different from the European standards of protection in the internal markets.[23] In this situation, a comprehensive understanding of how fair and equitable is viewed in North America would substantially increase the predictability of a future FET standard in an FTA. The North-North investment partnership is by no means over; rather, it has only recently begun.

Among the fears about the investment arbitration system, the argument about the regulatory chill is of high potency. We can never know for sure, whether investment protection standards, such as the FET standard, are *de facto* being used as leverage against public authorities.[24] In lack of such evidence, a study that focuses on discerning the legal culture in which the standard is being interpreted and applied does have at least the potential of mitigating the effects of the chill. Accordingly, this thesis could potentially correct false conceptions about the FET standard that negatively impacts policy and judicial decision-making, and possibly even work as a tool against investors who use the ISDS mechanism as leverage in negotiations.

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[21] Comprehensive Economic and Trade Agreement (CETA), Brussels 14 January 2017, Official Journal of the European Union L 11/23. See annex for the whole FET clause contained in CETA.

[22] The old view of IIA functioning as a tool for the North to protect its investments in the south is slowly disintegrating as the mechanism is being used in North-North investment relationships.

[23] For an extensive discussion on this, Niemelä (2017). See also: Eilmansberger (2009).

[24] Niemelä (2017), page 254-255.

2 Methodology

My methodology is divided into two subchapters, one on theory and the other on method. The subchapter on theory provides the thesis with a specific framework for looking at the whole academic and judicial discussion relating to the FET standard. The approach is a critical one. This means that the conceptual framework from which I analyze the material lacks any normative standard, it is instead an explanation of the *legal culture* as is.

The second subchapter focuses on the method used in the thesis. I have limited my approach in two aspects. First, I have decided to solely focus on the application and interpretation of the FET. Second, I have limited my analysis to claims brought under the North American Free Trade Agreement (NAFTA) and thus I exclude all BITs and other FTAs. The main reason for this has already been discussed in the chapter on the impact, namely that it is only the Northern American perspective on the FET standard that is on any relevance to this thesis. This is because future disputes that the critics fear would stem from CETA or a potential TTIP agreement.

2.1 Theory

My theoretical basis is a critical one and I therefore restrain from taking a normative approach on how the application of the FET *ought to be*. Instead, I focus on how the application of FET *is* made.[25] I postulate that in understanding the "legal culture" where the standards is interpreted and applied should render the FET standard predictable to the observer.

My understanding of predictability is deeply connected to my relation with law and society in general. When I was young, I had a fear of going to prison. I was afraid that I would do something that I didn't know was illegal and as a consequence, I would be condemned to serve a lengthy sentence. I had heard of the big law books which were thousands of pages long. How could I know what was forbidden and what was allowed? At the time, I was calmed by hearing that children do not get sent to prison - there was still time to learn.

Now, this obviously seems like a silly fear to have. However, for a child that has little to no experience of the world, it is actually logical to take prison into account: if you do something wrong, you go to prison. Obviously, I no longer go around fearing a prison sentence. But what has changed in my perception? And why aren't most people afraid of

[25] Cryer (2013), page 60.

doing something illegal? How is it possible that most people are law-abiding citizens while few have actually read the law codifications that constitute the core of society's code of conduct? There is a simple reason for this: people know how to act without explicitly knowing all the rules. The childhood fear is based on the belief that the law is a codification of rules and regulations that a group of people have just arbitrarily come up with. However, this is not correct. In its ideal form, laws are actually codifications of human behavior. It is simply an attempt at expressing something that we are already acting out. People don't have to fear unknowingly doing something illegal because we observe that the law (ideally) corresponds with what we regard as acceptable behavior. In that sense, the law is predictable in a "good way."[26]

In this thesis, I similarly try to analyze whether the FET standard is predictable in a good way. In practice, however, this project is in need of a more detailed theoretical framework. As the main critique against the ISDS system and the FET standard is being directed from the point of view of critical theory, it is necessary to review the theoretical foundation in which this critique has its roots.[27]

First, there is the theoretical framework for defining an abstract standard, such as FET. Here, I will try to rely on earlier works that have already laid out the theoretical framework. *Koskenniemi* has once used the analogy of holes in a net when describing expressions. A hole is empty in itself, and can only gain an identity through the strings that separate it from its adjacent holes.[28] The same analogy could also be applied to the standard of fair and equitable treatment. This standard only exists through the lines that border it. If a tribunal finds that there hasn't been a breach of the standard, then it gives us an indication of what exists "within the boundaries of the hole in the net." While a dismissive award of a claimant's allegation of a FET violation might not tell us where the

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[26] By this I mean that a normal person can act in society without knowing a single law, and still be a law abiding citizen (more or less). Of course, the law can also be predictable in a "bad way", as there can exist rules that do not correspond with ingrained human behavior, but that the members of society are still aware of. However, the main point here, is that there is a tendency in a democracy that laws are predictable in a good way as opposed to authoritarian countries, where the law is usually used as a means to justify arbitrary exercise of power.

[27] This is an attempt to adhere to the *principle of charity* which aim is to consider the best and strongest possible interpretation of a subject's argument in order to avoid attributing irrationality or falsehoods to the others sayings. See further Blackburn (2008), charity, principle of.

[28] Koskenniemi (1989), page 9. Koskenniemi further states, that "*[t]he sense of an expression is not determined ''from the inside'' but by the formal differences which separate it, make it different from other expressions in that langue. Meaning is relational. Knowing a language – understanding the meaning of words – is to be capable of operating these differentiations."*

bordering line exists, it can nonetheless serve as an indication of the ambit of the FET standard. It is then the final task of the thesis to conclude on whether the behavior that the standard either includes or excludes can be considered to represent codified rule of behavior that is already being acted out *by default.* Trough this, I will determine whether the FET standard thus can be viewed as being *predictable in a good way*.

Second, there is the more general theoretical framework through which the whole system of legal norms in international law can be observed. The reason why I have decided to use this theory is to ensure, that this thesis answers the critique against the FET standard with the "same tools."[29] Therefore, it is necessary to analyze the theory in further detail. In Critical Theory, or Critical Legal Studies, the ultimate goal is not to analyze how things are *supposed* to work; rather the object is to know *how* and *why* they work as they do.[30] Law should, therefore, be studied as a *world of facts* consisting of *individual legal decisions* and therefore this study is decoupled from the *world of ought.*[31] This idea is predicated on the famous slogan already formulated in American Legal Realism, "*law is what judges do rather than what they say*."[32]

In critical theory, law, rights and legal theory are essentially "indeterminate."[33] This fundamental argument is representative of critical theory. The main assertion is that a legal decision cannot derive from legal norms or legal reasoning themselves, but are instead a product of the surrounding circumstances. As it has correctly been pointed out "*Context is the Jupiter as well as Lucifer of interpretation*."[34] This argument is usually supported by examples of the inconsistent application of norms.[35] The indeterminacy of legal rules is only a direct product of the structures of the collective constructs of thought, which at their

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[29] If the critique would be answered by a strictly jurisprudential approach, the clash would not meet on the actual merits of the discussion, as the diverging views stem from different perspectives of looking at the law. In this context, I regard the theory as the "procedural law" on which I base my observations of the substantial material.

[30] Cryer (2013), page 60.

[31] Frerichs (2012), page 43. Further on this subject, see: Siltala (2011), page 163.

[32] *Ibid*., page 44.

[33] Singer (1984), page 10.

[34] Citing Robert Kolbs statement: '*Context est le Jupiter de l'interpretation; mais il en est aussi le Lucifer*'. Waibel (2011), page 577.

[35] Koskenniemi (1989), page 60. Some argue that there are "extra systemic" factors that lie behind contradictory results, such as the incompetence of the judge or political preference. However, this contains the assumption that indeterminacy could be "cured" by the right behavior and same understanding of legal concepts. Koskenniemi argues that this is false, since indeterminacy follows as a "*structural property of the international legal language itself."* Koskenniemi (1989), page 62.

core are contradictory.[36] Indeterminacy is a claim about the legal doctrine that argues that the doctrine allows for choice rather than limiting it.[37]

It is necessary to differentiate between the indeterminacy of standards and rules with formal realizability.[38] The latter is a dimension of rules which, in its extreme form, the judge can easily apply in a determinate way.[39] The former, however, is not as easily applied in the same way.[40] A standard, according to critical theory, is a direct reference to a substantive objective of the legal order in question.[41] In the context of indeterminacy, when the judge is applying a specific standard, the judge is forced to discover the facts of the situation and assess them against the ideals and social values that are inherent in the standard.[42]

Indeterminacy gives the power of interpretation to the individual and gives them the possibility to use their intuition in a specific situation. [43] Indeterminacy of law should not be seen as an external influence by politics that somehow distorts the otherwise predictable and determinate law; rather indeterminacy is an integral part of the law itself.[44] The legal argument allows for the predictable defense of whatever position while at the same time it is being constrained by a rigorously formal language.[45] The fruit of indeterminacy is that the outcome of a legal dispute has little or nothing to do with either the norm or the

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[36] Gordon (1984), page 114. Gordon further argues that: *We are, the theory goes, constantly torn between our need for others and our fear of them, and law is one of the cultural devices we invent in order to establish terms upon which we can fuse with others without their crushing our identities, our freedom, even our lives.*

[37] Singer (1984), page 11.

[38] Kennedy (1976), page 1687.

[39] *Ibid*., page 1688. An example of this is a situation where the judge is faced with applying traffic laws concerning speed limits. Within this context, the judge is able to act in an extremely determinate way. This should not be confused with a more general theory of the determinacy of law. A legal theory that is determinate gives specific guidelines on how to act. Essentially, it constrains our actions and sets out clear boundaries on what our choices are limited to. Singer (1984), page 12. According to Singer, "*Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinate rules and arguments are desirable because they restrain arbitrary judicial power*.". The total determinacy of law is an illusion. Interpretation without law creation is arguably not possible, since international law is 'law in action' which renders any attempt to declare a definite statement of the law pointless. Waibel (2011) page 576.

[40] The same is true when the judge is faced with interpreting a policy or a principle.

[41] Kennedy (1976), page 1688. Kennedy lists some examples of this, including good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness.

[42] *Ibid*., page 1688.

[43] Singer (1984), page 13

[44] Koskenniemi (1999), page 354

[45] *Ibid*., page, 355.

behavior; instead, it is mostly if not wholly dependent on the lawyer's ability to use this formal language.[46] Indeterminacy is, therefore, a product of the contradictory and transformational nature of the legal argument.[47]

How then is it possible for legal decisions to be predictable if we argue that legal doctrine is indeterminate? And does it mean that indeterminacy gives way to unlimited arbitrary judicial power? With regards to the first question, it is important to point out that indeterminacy and predictability are not mutually exclusive.[48] Quite the contrary, there are stable regularities within the context of interpretation and application that makes it possible for seasoned legal practitioners to make predictions for their clients.[49] However, according to the Critical school, these regularities are not necessary consequences of the given rules. Instead, they can exist independent of them.[50] Therefore, the argument is that there are predictable patterns of behavior and decision-making in the *legal culture*, which is not dependent on the actual argument made by the authorities applying the law.

The second question can arguably be clarified through making a distinction between arbitrariness and indeterminacy. It is necessary to remember, that indeterminacy does not mean that the choices made by judges are necessarily arbitrary or capricious.[51] There is therefore a crucial difference between arbitrariness and indeterminacy of legal arguments. Arbitrariness includes such a judgment where the deliberation is based on values that are not accepted by the majority and as such a test of arbitrariness is dependent on what kind of reception the judgment would get from a group of disinterested people.[52] As mentioned above, when it comes to the indeterminacy of law, it is entirely possible for the outcome of

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[46] Kennedy makes an interesting point on discourse in stating that ""Discourse is a system of interdependent arguments in which the value of each argument results solely from the simultaneous presence of the others" Kennedy (1980), page 375

[47] *Ibid*., page 367.

[48] Gordon (1984), page 125.

[49] Gordon argues that "[*The Critics] don't mean-although sometimes they sound as if they do-that there are never any predictable causal relations between legal forms and anything else. As argued earlier in this essay, there are plenty of short- and mediumrun stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules. Lawyers, in fact, are constantly making predictions for their clients on the basis of these regularities*" Gordon (1984), 125

[50] *Ibid*., 125

[51] Singer (1984), page 20.

[52] An example of arbitrariness can be found in the Elsi case, where the Court stated that: *"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law". Elsi* judgment, I.C.J. Reports 1989, para. 128. See also: B. E. Chattin (United States.) v. United Mexican States (1929), page 295, para. 29, Asylum Case, (Colombia v. Peru), Judgement, I.C.J. Rep. (1950)., page 284.

the decisions to be predictable as long as the context of the decision is familiar. The legal context includes the institutional setting, the customs of the community and the ideology of the decision maker.[53] There are several reasons why an understanding of the legal context could enable us to predict the legal results. Among these, one central idea is that judges and decision makers usually share a common *legal culture,* and while some legal doctrines and theories included in this culture could potentially be used as support for many different outcomes, there nonetheless exists a likelihood that some rules and outcomes are more attractive than others.[54]

In conclusion, the indeterminacy of legal doctrines is not equated to arbitrary legal decisions. There can be predictability of legal decision even if we argue that legal doctrine is indeterminate. The legal culture can explain the predictability of judicial decisions that they are given in. It is important to note the difference between rules that are formally realizable and indeterminate standards. The FET standard is undoubtedly part of the latter. Thus according to this theoretical framework, the arbitrator is interpreting and applying the standard by discovering the facts of a given situation and assessing them against the ideals and social values that are inherent in the standard. These ideals, or purposes, and social benefits are intrinsic in the legal culture in which the international investment arbitrator more or less adopts when entering the field. Therefore, I aim to give an account of the legal culture that forms the contexts for the awards where the standard of fair and equitable treatment has been applied. I hope to be able to provide an account of the regularities within the application of the standard mentioned above. If such regularities are found, it can be argued that the application is predictable.

2.2 Method

The method applied in this thesis is qualitative in that I have limited my observations to NAFTA chapter 11 tribunals that have interpreted and applied the FET standard.[55] The method aims to analyze the most prestigious and cited awards in an attempt to get an understanding of the central tendencies of the legal culture. This research also includes interviews, where the aim is to get a "hands-on" account of investment arbitration proceedings where the standard has been applied.

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[53] Singer (1984), page 21

[54] *Id*..

[55] Burton & Watkins (2013), page 55-65.

I have decided to focus on the FET standard, since it has by far been the most popular standard used by investors when relying on ISDS clauses, both within NAFTA and internationally.[56] I have limited the focus to NAFTA because of the predominant role that the US and Canada play in the development of international investment law. In light of the already binding CETA and a potential TTIP agreement, understanding how investment standards have been interpreted and applied in North America is of crucial importance.

My research question is evaluative in the sense that it assesses the interpretation and application of the standard against the parameter of predictability. I briefly discussed the definition of predictability in the theory. The critical thing to remember is that predictability is connected to the legal culture in which the award is being given. As I argued above, legal indeterminacy is not identical with arbitrariness. While they are not mutually exclusive, I still argue that if the observer knows the legal culture, the outcome of the dispute is more often than not predictable. [57] Ideally, a predictable FET standard is one that embodies rational behavior that is already being acted out.[58]

The method is divided into two chapters, the interpretation and application of the standard. In the chapter on interpretation, I have further divided the analysis into general interpretation and specific interpretation. The subchapter on general interpretation aims to reflect the interpretation of the FET standard with the general rules on interpretation contained in the Vienna Convention on the Law of Treaties (VCLT). The subchapter on specific interpretation gives an analysis on the internal conflicts of the standard and goes through the particular traits of its theoretical formulation. The second chapter, namely the application of the standard, focuses on how the standard has de facto been applied. As I will later show, a violation of the FET standard always occurs through a breach of one of its concrete elements.

[56] Dolzer & Schreuer (2012), page 130.

[57] That is, arbitrary awards are still possible within this framework since the legal culture can be predictable in a "bad way". See footnote: 24.

[58] This is only limited to "good predictability".

3 Background

This chapter will give a short historical account of the different components out of which the FET standard has developed. The chapter is divided into three subchapters, which all aim to approach the standard from a different angle. The first and second subchapter focuses the political and legal aspect of protecting alien property. The third subchapter tells the story of how the actual *means* of safeguarding foreign property have developed. This development is crucial in the history of the FET standard since the standard is nothing more than the actual forum it is being applied in.[59]

In all, the chapter aims to further the understanding of the legal culture in which the standard is being interpreted and applied in. I argue that the standard is intimately connected to its history and that the agents (investors, governments and arbitrators) who have an interest hinged on this standard (claim damages, waive damages or deliberate well-founded awards) all strive to reach the highest understanding of the FET standard. Consequently, predictability is primarily contingent on the culture in which the battle of the highest understanding is executed.

3.1 The Politics of the International Standards on Protecting Property

At the beginning of the 20th century, there was a broad consensus that an aliens property rights were inviolable and that positive international law protected the private property of aliens in times of peace.[60] Before World War I, there can be said to have existed a National Treatment (NT) standard, since almost all states both recognized the right of private property as well as the obligation of the state to compensate an owner in situations where the state expropriated the property for public use.[61] In his speech to the American Society of International Law, Elihu Root stated that:

> *There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it*

[59] Today, the discussion about some abstract notion of ”fair and equitable treatment” would hardly be of any scholarly interest if it was not the case that the standard is actually being enforced by IIAs.

[60] Bullington (1927), 694-696.

[61] Lowenfield (2002), 392.

> *accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law does not conform to that standard, although the people of the county may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens*. [62]

This famous speech reiterated the principle of NT, meaning that states had to provide the same kind of treatment to aliens as they did to their citizens.[63] Root nonetheless expressed his sentiment towards the existence of an international minimum standard of treatment, a *general standard*, as he calls it. [64] He referred to situations where NT did not suffice, and that other states should therefore not "*be compelled to accept*" such treatment that did not reach this unspecified general standard. What Root seemed to suggest, was that sovereignty could be limited in situations where states do not reach this general standard.

The need for an international minimum standard became apparent through the socialist reforms around the world, mainly through the Mexican and Russian revolution.[65] Here, the concept of private property was radically changed, which in turn created a need for explicit rules on the international standards of the treatment of foreign property.[66]

The different understanding of what constitutes as just compensation due to expropriation between Western and Latin American states can be exemplified through the diplomatic correspondence between the US and Mexico. The communication concerned the compensation of confiscations executed by the Mexican state. The United Secretary of state, Cordell Hull, fully recognized the right of the state to expropriate the property of American citizens but contended that the compensation of this property should be *prompt, adequate and effective*.[67] This later came to be the so-called *Hull Formula*. The Mexican government denied that there existed such a rule in international law that would obligate

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[62] Root (1910), page 16-27.

[63] Lowenfeld (2002), page 392.

[64] Root (1910), page 16-27.

[65] For the purposes of this thesis, I will not focus on the Russian Revolution. There is no doubt that the Russian Revolution also played a large part in the international discussion of investment protection, as the property of many foreign aliens was nationalized in the process. See more on this: UNCTAD: Expropriation: Series on Issues in International Investment Agreements II (New York and Geneva, 2012).

[66] Obviously, the situation was more radical after the Russian revolution, where the whole concept of private property was abolished.

[67] Lowenfeld (2002), page 400

the state to give adequate and immediate compensation to the alien.[68] Here, the Mexican understanding of compensation was more aligned with the Calvo Doctrine. This doctrine did not recognize any rights by foreigners that were not also accorded to nationals, which meant that aliens should not be able to seek redress through diplomatic protection.[69] This was thus an apparent reaction against ideas of an international minimum standard or the general standard that Root had talked about.

As it will become apparent in what follows, the FET standard began to be included in primarily in friendship, commerce and navigation (FCN) treaties that the US entered.[70] From the beginning of the 60s, the standard started to be included in BITs that were being concluded between capital exporting and importing countries. While the relationship between the FET standard and the general standard, later known as the customary international law minimum standard of treatment of aliens (CILMSTA), will be the focus of chapter three, there is no doubt that Roots vision slowly started to develop into a concrete standard. This will be discussed in the following subchapter.

3.2 The Law on the International Standards on Protecting Property

This subchapter focuses on how the FET standard has emerged in international law. It will give a short account of how the ICJ has dealt with the standard, after which it will focus on how the standard was gradually implemented in international treaties.

3.2.1 The FET standard in ICJ adjudication

As a general disclaimer, it is necessary to point out that the International Court of Justice (ICJ) has never dealt with the FET standard as it is understood in international investment law today. Despite this, there are some cases in which the Court has touched upon the issue of the treatment of investors and investments.

The *Chorzów Factory* case decided by the Permanent Court of International Justice (PCIJ) in 1928, serves as an excellent example on how compensation was regarded in international law in the early part of the 20th century.[71] The case concerned a dispute concerning the content of a bilateral treaty, the Upper Silesia convention (1922), and

[68] *Ibid*., page 401

[69] For more information on the standard, see: OPIL: Calvo Doctrine/Calvo Clause (2007).

[70] OECD (2011), page 5.

[71] Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17 (1928)

expropriations that had allegedly been made contrary to the treaty. The Court noted that compensation is only limited to the value of the expropriated property plus interest in situations where the government has the right to expropriate.[72] Note that there is a difference between a (lawful) expropriation and an illegal seizure of property. In this case, the Court concluded that the seizure of the property had been illegal and drew the following conclusion on what the correct compensation should be:

> *The essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals-is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*[73]

It is relatively evident from the text of the judgment that this standard of compensation can only be applied to situations where the seizure has been illegal. Therefore, it could not be used as a fundamental principle of compensation for expropriation of foreign property, since expropriations are usually legal in that they have a legitimate aim that serves a public need.[74] Nonetheless, the Court reiterated the vital principle regarding fair and just compensation that includes the obligation to compensate as a consequence of an illegal act to such a degree, that the financial situation of the claimant is in the same position that it would have been, had the illegal act not been committed. Despite this, the ICJ has been silent on issues concerning the existence of a customary international law minimum standard of treatment of aliens.

Another ICJ case that is of interest within this context is the *Elsi* case, decided between the US and Italy in the late 1980s. In that case, the US argued that Italy had violated the FCN treaty between the two countries.[75] The issue concerned the requisition done by an Italian Mayor of a plant owned by a US investor. The US argued that the Italian authorities had allowed the plant to become occupied and that this constituted a violation against the prohibition of arbitrary and discriminatory acts prescribed by the FCN treaty. The ICJ

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[72] *Ibid.* page 46-47

[73] *Id*..

[74] Sornarajah (2010), page 428.

[75] Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic. 2 February 1948. In force 26 July 1949. 79 UNTS 171

found that the protection expressed in the FCN treaty did not guarantee the US investor that there would be no disturbance and that the requisition by the Italian government did not violate the requirement. The Court pointed out that the requirement should be measured according to the "minimum international standard."[76] In his dissenting opinion, Judge Schwebel argued that the underlying principle of the FCN treaty be that of "equitable treatment" and as such, the fact that the US investor had lost control despite being shareholders in the company, constituted a violation of the principle of "equitable treatment."[77]

In the *Oil Platforms* case of 1996, the ICJ further touched upon the issue of "fair and equitable treatment," contained in a treaty between the disputing parties.[78] The dispute concerned the destruction of a US Navy ship and three Iranian oil platforms. The Court did not specify the meaning of the standard that was contained in Article IV (1) of the treaty; however, in her separate opinion, Judge Higgins argued that:

> *The key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection, which is what is there addressed […]"*[79]

As already mentioned, the ICJ has not taken a clear stance on the existence of the FET standard and its definition. Apart from Judge Schwebel, who has been an active supporter of investment arbitration, the Court has been reluctant to take part in the discussion to a higher degree than the issues of each case has required of it. As it will be show in later chapters, the most prominent contribution to the development and definition of the FET standard can be found in the awards by investment tribunals.

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[76] Elettronica Sicula S.p.A. (ELSI) Case, (U.S.A. v. Italy), I.C.J. Rep. (1989). page 66

[77] Elettronica Sicula S.p.A. (ELSI) Case, (U.S.A. v. Italy), I.C.J. Rep. (1989). (Dissenting opinion Judge Schwebel). Page 88 and 97.

[78] Oil Platforms Case, (Islamic Republic of Iran v U.S.A), I.C.J Rep. (2003)

[79] Oil Platforms Case, (Islamic Republic of Iran v U.S.A), I.C.J Rep. (2003) (Separate opinion Judge Higgins). Page 59.

3.2.2 The FET standard in treaties

The FET standard was first applied in its current wording by the US in its FCN treaties after the World War II.[80] The standard functioned as additional security for non-discriminatory treatment of both US nationals and its property.[81] In 1959, the FET standard was included in the Draft Convention on Investments Abroad,[82] which was later copied in the 1967 Draft Convention on the Protection of Foreign Property by the Organisation for Economic Cooperation and Development (OECD).[83] In the OECD Draft Convention on the Protection of Foreign Property, Article 1 ensures that "*every party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties…*".[84] In its commentary on Article 1, the FET standard is stated to require that the level of protection is the same as that which a Party affords its nationals. However, when the national law or administrative practices fall short of the requirements of international law, the standard still requires conformity with the minimum standard that forms part of customary international law.[85]

It was not until the vast increase in BITs that the FET standard became *the standard* in treaties concerning international investment. The first BIT was concluded in 1959 between the Federal Republic of Germany and Pakistan. This constituted the beginning of a new era of international investment, and the subsequent decades witnessed an explosion of BITs being concluded between states. Today, 180 countries have concluded more than 2900 BITs and the average state has concluded about 32 BITs.[86] Some authors argue that the reason why treaty drafters have consistently relied on the use of vague references to fair, equitable, reasonable or just treatment is that of their relative indeterminacy that has allowed to parties to reach agreements which would, arguably, not have been the case if

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[80] Vandevelde (2009), page 44

[81] Weiler (2013), page 199

[82] Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention), issued April 1959. Not in Force. Article 1.:Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures.

[83] OECD Draft Convention on the Protection of Foreign Property (OECD Draft Convention), issued 12 October 1957. Not in Force. Article 1: Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties.

[84] *Id*..

[85] *Ibid*., Article 1, page 9 para. 4(a)

[86] ICSID Database (2017).

they were expressed in more concrete terms.[87] In the early days of its application, it can thus be argued that the FET standard was used as a tool for filling a "legal vacuum" which other standards did not reach.

What do investors seek protection from trough the FET standard? Aron Broches, one of the leading drafters of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), has provided a useful hierarchy of risks that a foreign investor faces in a host country.[88] While this risk division mostly related to International Investment Guaranties, the same risks arguably apply when discussing international investment from a legal point of view. An investor could only be insured from measures that fall below the minimum standard. The absolute minimum standard has to protect from expropriation of nationalization without adequate compensation, which he refers to the *political risk*.[89] The investor should also be protected from the inability to repatriate capital, which he calls a *transfer risk*, and the loss that is connected to international war referred to as a *calamity risk*.[90] These standards are definitive in a sense that there exists no disagreement on these on their existence.[91] Then, there exist those risks for investors that do not constitute an outright expropriation but where the investor is nonetheless deprived of the control or the benefit of his investment, often referred to as *creeping expropriation.* The last category of risks, or rather a standard of treatment, refers to minimum rules of proper conduct against foreign investment, which includes protection against discrimination.[92] It is important to note that by no means was Broches arguing in favor for a global system in which a foreign investor is free from all risks and that the investor always carried its own business-related risks.[93]

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[87] Weiler (2013), page 188. More on this discussion, see: Dolzer & Schreuer (2012), page 133 and Brower II (2002), page 78.

[88] Möller Interview (2017)

[89] *Ibid*., page 82.

[90] *Id*..

[91] However, there throughout the development of international investment law, countries have disagreed on the exact obligations of the state with regards to these protective standards. For example, see the correspondence between Mexican and US Secretaries of States, where they dispute how a foreigner ought to be compensated. Further expanded in chapter 3.3. For detailed correspondence letters, see: Office of the Historian, 15 December 2017.

[92] Broches (1962), page 82.

[93] Broches (1962), page 81-86. While the minimum standards Broches referred to were related to insurances given by what was to become the Multilateral Investment Guarantee Agency (MIGA, established in 1988), the underlying idea minimum standard still drew from the same core understanding of how private property

While most of the abovementioned risks could arguably be included in the FET standard, the last category of "creeping expropriation" is indeed most fitting for the standard. As it will become clear in chapter 5, there are many different elements of which the FET standard is composed. In most situations, the question in the dispute concerns the deprival of control or benefit of the investment. In any event, it is clear that the further away we get from the political risks that include outright expropriation or nationalization, the blurrier the line between the alleged breach of a minimum standard and a risk that is connected to normal business.

3.3 Means of Protecting Alien Property

The means of settling international disputes have varied through the course of history. As western states started to turn their back on using gunboat diplomacy as a means of enforcing their demands, the need for binding and comprehensive legal instruments of enforcement became necessary. The following subchapters will give a short account of the development of the international recognition and enforcement of international arbitral awards. These developments constitute the foundation of how we view international dispute resolution today.

3.3.1 Diplomatic Protection

At the beginning of the 20th century, investment disputes and subsequent investment protection were usually managed through diplomatic negotiations executed between states. It is important to note, as the ICJ already pointed out in the *Palestine Concessions* case in 1924, that a state was, in reality, asserting its rights, namely its right to ensure the respect of the rules of international law of its subjects.[94]

Settling investment disputes through diplomatic protection was a burdensome task since it necessarily meant that the investor was forced to convince their home states to advocate on their behalf. Procedures for diplomatic protection were in direct connection to geopolitical and diplomatic ties between the disputing states. These ties were obviously highly influential on the negotiations and investors could never entirely rely on a neutral

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should be treated. For further information on the project, see: Multilateral Investment Guarantee Agency (2017).

[94] Mavrommatis Palestine Concessions, (Greece v Britain), Judgement, PCIJ Rep Series A No 2 (1924), para. 21.

procedure.[95] This can further be exemplified by the pronouncements made by the ICJ in the *Barcelona Traction* case in 1970, where the court stated that:

> "*The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case*".[96]

As the Court points out, it is completely up to the state whether it finds that the dispute in question is "worth it," considering political and other factors that are unrelated to the actual dispute. This was obviously not an adequate remedy for an investor, as there was no way that the investor could rely on the fact that its interest was prioritized by its home state rather than geopolitical relations between the states.

3.3.2 International Arbitration

International arbitration constitutes a cornerstone in the development of investor-state disputes. As mentioned above, diplomatic protection was a burdensome channel through which the investor had to seek remedies, and this was only if the home state found it to be beneficial to its geopolitical aspirations. The crucial change in the development was the exclusion of the home state from the dispute process, which was replaced by third-party investment arbitration. This would not have been possible had it not been for the general development of international commercial arbitration. This subchapter will therefore focus on the general recognition of international arbitration.

As international commerce expanded over the 20th century, states increasingly made attempts to facilitate commerce between corporations from different countries by giving individuals a more significant role in the resolution of commercial disputes.[97] The Geneva Protocol on Arbitration Clauses (Geneva Protocol of 1923) constitutes one of the cornerstones in the development of international arbitration.[98] The protocol was drawn up

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[95] Weaver (2014), 229. Here, neutrality is refer to the absence of geopolitical influences.

[96] Barcelona Traction, Light and Power Company, Limited, Judgment, (Belgium v. Spain) Judgement, I.C.J. Rep. (1970), para. 79

[97] Van Harten (2007), page 50

[98] Geneva Protocol on Arbitration Clauses, Geneva 24 September 1923, 27 LNTS 157.

by the League of Nations by the initiative of the International Chamber of Commerce (ICC) and was mostly signed by European states.[99] The protocol obligated the parties to:

> "*[S]ubmit to arbitration all or any differences that may arise in connection with such contract relation to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject to*"[100]

According to the protocol, each Contracting state had still reserved the right to limit the definition of which contracts that are considered commercial according to their domestic laws. In addition to this, all arbitral procedures were to be governed by the law of the country in whose territory the arbitration took place.[101] This protocol was complemented by the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention of 1927).[102] The Geneva Convention of 1927 obligated the recognition of arbitral awards covered by the Geneva Protocol of 1923.[103] This opened the possibility for parties to enforce the arbitral award in the territory of any state party to the treaty. However, the Geneva Convention of 1927 demanded that some conditions have been met before an award could be recognized and enforced. One of these conditions was that the subject matter of the award had to be consistent with the law of the country in which the award was sought to be relied upon.[104] The sentiment behind these conditions demonstrated a will to preserve domestic judicial autonomy.

In 1953, the first initiatives to replace the Geneva Treaties were taken by the ICC. The idea behind this initiative was to create a new international system of enforcing arbitral awards in which the awards were '*truly international*,' i.e., enforceable regardless of domestic laws.[105] This was based on the critique of the Geneva treaties, which central defects had

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[99] Van Harten (2007), page 50

[100] Protocol on Arbitration Clauses, (Geneva, 24 September 1923). Article. 1.

[101] *Ibid*., Article 2 & 4.

[102]Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927. In force, 25 July 1929, 2096 LNTS 301.

[103] *Id*..

[104] *Ibid*., Article 1 (b). For all the conditions, see Article 1 & 2

[105]ICC, Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration (13 March 1953), 9/No.1 – May 1998. Page 2. *In actual fact, the idea of an international award, i.e. an award completely independent of national laws, corresponds precisely to an economic requirement. It is certain that a commercial agreement between the parties, even for international transactions, will always be linked tip with a given national system of law. Nevertheless, the fact that an award settling a dispute*

been that enforcement was only possible if the awards were strictly in accordance with domestic rules and procedures. The United Nations Economic and Social Council (ECOSOC) took over this initiative and published its amended draft convention in 1955.[106] This draft led to the establishment of the New York Convention in 1958.[107] During the negotiations of the New York Convention, the point of clash took place between the expansion of the recognition of commercial arbitration and the need to preserve domestic judicial autonomy.[108] While initiatives within the UN were more modest than that of the ICC, the New York Convention did nonetheless bring significant changes to the enforcement of international arbitral awards. The Convention required states to recognize arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon, thus excluding the requirements from the Geneva Conventions that the award had to be consistent with the domestic law of the recognizing state.[109] This meant that a significant degree of judicial control that had been exercised over arbitral awards was relinquished. Therefore, it is not without reason that the New York Convention has been regarded as one of the most important cornerstones in the international arbitration.[110]

3.3.3 The Inclusion of Public Law in International Arbitration

As witnessed above, there was a gradual change in attitude towards international arbitration and its relationship with the domestic law. The New York Convention constituted a real paradigm shift in the enforceability of international arbitral awards. The success of the Convention still manifests itself today, as the primary way of solving international commercial disputes is done through international arbitration.[111] This subchapter will focus on the emergence IIA.

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arising in connection with this agreement will produce its effects in different countries, makes it essential that it should be enforced [8] in all these countries in the same way. The development of international trade depends on this.

[106]ECOSOC, Report of the Committee on the Enforcement of International Arbitral Awards, (28 March 1955) UN Doc E/2704, E/AC.42/4/Rev.1.

[107] United Nations Conference on International Commercial Arbitration (New York, 20 May-10 June 1958) UN Doc. E/CONF.26/8/Rev.1.

[108] Van Harten (2007), page 51.

[109] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), New York 1958, in force 7 June 1959, 4739 UNTS 330. Article III

[110] Van Harten (2007), page 53.

[111] The main reason for this is the predictable framework of enforceability that the New York Convention provides. It is far more un common that commercial actors rely on the domestic judicial system in situations

As the New York Convention still allowed states to limit their obligations to *commercial disputes*, foreign investors were still left without an effective remedy against the host state when it was acting in the capacity of a public authority.[112] However, this situation changed as a new legal tool became available to foreign investors. The ICSID Convention was concluded in 1965 and opened the possibility for regulatory disputes between states and investors to be settled in international arbitration.[113] Through the Convention, the International Centre for Settlement of Investment Disputes (ICSID) was established as a part of the World Bank Group.[114] It is noteworthy, however, that there was no immediate rush by investors to utilize the new form of international arbitration. It was the inclusion of the ISDS clauses in BIT that gradually increased the amount of investor-state disputes. According to a report made by the United Nations Conference on Trade and Development (UNCTAD) in 2016, it was not until the beginning of 2000 before there was a significant increase in ISDS cases.[115]

The awards that have been given under the ICSID Convention are final and binding, which means that the domestic courts of the member states to this Convention cannot overturn them with certain exceptions.[116] In addition to this, member states to the Convention, regardless if they are parties to the dispute, are obligated to recognize and enforce the

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where they wish to enforce the judgment in another country. This is mainly due to the problems with enforcement but also Other reasons for the popularity of international arbitration over domestic courts is the possibility of confidentiality as well as the freedom to appoint the arbitrators in the proceedings

[112] New York Convention (1958), Article I.3. That is to say, that international arbitration was limited to commercial disputes, which in turn can be considered to be part of the private sphere. This did not exclude the possibility that the commercial actor disputed with a state. However, in these cases, the state was essentially functioning as private actor in these disputes. The jurisdiction given to arbitrators in commercial disputes is still limited to the contract between the parties and the object of the dispute does not concern the states exercise of public authority over individuals. See further: Van Harten (2007), page 5.

[113] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Washington D.C. signed 13 September 1966. In force 14 October 1966. 8359 UNTS 575.

[114] ICSID provides an institutional framework for the investment disputes. This includes facilities, a secretariat etc.

[115] During the whole 90s, there were fewer than 30 cases in total, while during the 00s there were around 300 cases. See further: UNCTAD, World Investment Report (2016), page 104.

[116] ICSID Convention, Article 53. In some instances, set aside proceedings are possible, see for example United Mexican States v Metalclad Corp, 2001 BCSC 655. Another important thing to note is the role of the UNCITRAL Arbitration Rules (UNCITRAL Arbitration Rules (1976), UNGA Res 31/98.). These rules are used in some ISDS proceedings, and provide a procedural framework for the Tribunal. The ICSID Convention also contains rules for procedure for the arbitral tribunal. Roughly speaking, it is at the discretion of the parties to choose which rules they wish the Tribunal is governed by. However, the important thing to note is that the whole system behind IIA is predicated on the ICSID Convention, and as such the UNCITRAL Rules are of little importance in this thesis.

awards as if they were a final judgment of a court in that state.[117] The jurisdiction of an investment tribunal is extended to any legal dispute that arises directly out of an investment between a contracting state and a national of another contracting state, as long as there is a reference to arbitration in the BIT or FTA as the primary way of resolving disputes.[118]

The parties must consent to arbitration in writing when submitting a dispute to ICSID.[119] It is important to note, that the mere participation in the Convention does not in itself infer any obligations on states to consent to ICSID jurisdiction.[120] There are three different ways of giving consent to arbitration: direct agreement, national legislation and treaties. From a public law perspective, we are interested in the latter alternative, namely consent trough treaties. The most common treaties in which consent to arbitration at the ICSID occur are in BIT. Other treaty forms, such as FTAs and regional multilateral treaties (NAFTA and the Energy Charter Treaty) also include the state parties consent to arbitration, that is, the treaties have included ISDS provisions in the treaty text.[121]

According to the ICSID Convention, written consent is required of both parties. With regards to the investor relying on a BIT between his home state and the host state, the investor will have to consent to arbitration separately. In practice, however, the fact that an investor institutes proceedings at the ICSID are usually sufficient to be considered as consent.[122] If states consent to arbitration in a BIT, they are automatically bound by the jurisdiction of the investment Tribunal in all legal disputes concerning the treaty that originates from a claim by an investor from the other state. Today, consent trough BITs

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[117] *Ibid*., Article 54.

[118] Here I use the term "investment Tribunal" although it is synonymous to IIA, ICSID-tribunal and investment arbitration. All terms make a reference to the general concept of arbitration (not a court) concerning investment protection standards contained in international treaties and agreements (BITs and FTA's) between a private investor and a state. ICSID should not be confused with a Court, as it does not facilitate a tribunals with permanent members. In broad terms, the ICSID can be compared to any arbitration institutions, such as the SCC, ICC or the LCIA.

[119] ICSID Convention, Article 25 (1)

[120] UNCTAD, Capital Accumulation, Growth and Structural Change (Geneva 2003) UNCTAD/TDR/2003.Page 5.

[121] *Ibid*., page 6

[122] AMT v. Zaire, Award, 21 February 1997, 36 ILM 1531, 1545/6 (1997). *In the present case, it happens that AMT (...) has opted for a proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates that consent necessary to validate the assumption of jurisdiction by the Centre.*

have become accepted practice and can be found in the overwhelming majority of new BITs.[123]

In cases where consent have been given in treaties, the jurisdiction of the ICSID is primarily based on a general consent by the states which is groundbreaking if we compare it to the New York Convention, where international arbitration is limited to the conditions in a contract between the parties. This constitutes a radical change in the development of international arbitration since it permits investment arbitration to be used as a form of public law adjudication.[124] As mentioned above, the jurisdiction of an investment tribunal is extended to any legal dispute that arises directly out of an investment.[125]

In conclusion, this system provided three new possibilities to foreign investors seeking a remedy from the host state. Namely, it made it possible for the foreign investor to a) sue a host state through private international arbitration that was b) acting in the capacity of a public authority c) concerning a violation of public international law.

4 General Interpretation of the FET Standard

In the following two chapters, the aim is to analyze the interpretation of the FET standard. This analysis is an attempt to reaching an abstract definition of the standard. The standard is part of binding law, both in specific treaties as well as in customary international law. If we go back to the analogy to the fishing net, one could make the argument that this aim is useless, since it is impossible to conclude the definition of the standard in the abstract. While this critique is justified, it is necessary to note that the starting point for interpreting the standard is that it is being interpreted and applied as a law, and not according to *ex aequo et bono*.[126] Therefore, we need to accept the premise that there exists an ideal form or archetype of the FET standard that is grounded in the treaties and customary international law. From a theoretical standpoint, the aim is not so much to try to find an actual definition, or the ideal form itself; instead, the aim is to become familiar with the legal culture surrounding the definition of the standard. Therefore, this thesis does not

[123] According to statistics provided by the OECD, in all the existing BITs, 93% of them contain ISDS provisions. See: OECD, Investor-State Dispute Settlement (Paris 16 May - 9 July 2012), page 8.

[124] Van Harten (2007), page 55-56

[125] ICSID Convention, Article 25 (1)

[126] Further on this, see: OPIL: Ex Aequo et Bono (2009)

concern itself with taking a normative approach to how the standard should be interpreted since this would be a counterintuitive approach in light of the research question that is concerned with the predictability of the standard.[127] Therefore, it is only concerned with how the standard is *de facto* being interpreted.

The following two chapters have divided the analysis of the interpretation into two parts, one general and one specific. The general part discusses the rules of interpretation and how different Tribunals have used the tools specified in these rules. The specific part analyzes the particular approaches that both states and Tribunals have adopted in trying to define and interpret the FET standard. It also discusses the *notes of interpretation* concerning the standard that was published after some controversial awards.[128] The notes of interpretation constitute a crucial milepost in the development of the standard, and as it will be shown in the next chapter, it had severe implications on the following awards.

A final note should be made on the abbreviation used. When referring to the minimum standard of treatment, writers and Tribunals alike are talking about the CILMSTA.[129] The relationship between the FET standard and CILMSTA is discussed in chapter 5.

4.1 Sources of International Investment Law

The sources of international investment law, that is, the accepted sources that an investment Tribunal can base its award on, follow the same rules as accepted in international law. A complete list of the sources applied in international law can be found in Article 38(1) of the ICJ Statute.[130] Primary sources of international law include treaties, custom and general principles of law.[131] Subsidiary means for determining the primary sources include judicial decisions and teachings of the most highly qualified publicists.[132]

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[127] That is, even if this thesis could reach a definition on the ideal form of the FET standard, this would give the research question little to no guidance on the predictability. This assertion is strongly rooted in the principle that the *law is what judges do rather than what they say they do.* It would be possible,at least in theory, to reach a normative result concerning the FET standard that is different from the interpretations made by the majority of the Tribunals

[128] The controversy was related to how the FET standard should be interpreted, with regards to the autonomous standing in relation to the international minimum standard. This will be clarified in 4.2.3.1.

[129] The credit for this abbreviation goes to T. Weiler, who coined it in his book: *The interpretation of international investment law: equality, discrimination, and minimum standards of treatment in historical context* (Martinus Nijhoff Publishers 2013)

[130] ICJ Statute, Article 38(1) 1.

[131] *Ibid*., Article 38(1) (a-c).

[132] *Ibid*., Article 38(1) (d).

In the *Continental Shelf* case, decided in 1969, the ICJ laid out precise requirements on the establishment of a rule in customary international law.[133] If a party to a dispute claims that there has been a violation of such a rule, the Claiming party has to show sufficient state practice and *opinio juris*.[134] For the requirement of opinio juris to be satisfied, the Court argued that "*States concerned must […] feel that they are conforming to what amounts to a legal obligation."* and added that "*The frequency, or even habitual character of the acts is not in itself enough."*[135]

The ICSID Convention includes the same rules of sources of international law as prescribed in the ICJ statute. Tribunals can either give an award based on an agreement between the parties or based on "*such rules of international law that may be applicable*," which usually includes investment treaties and customary international law.[136] A tribunal cannot bring a finding *non liquet,* that is, a Tribunal is forced to give an award regardless of the law is silent or obscure.[137] Only if the parties agree, can the Tribunal decide a dispute *ex aequo et bono*.[138] In none of the reviewed cases in this thesis have the parties accepted to this.

In addition to this, Tribunals rely extensively on subsidiary means for determining the specific rules prescribed by investment treaties and customary international law. As this chapter will later show, Tribunals make extensive reference to other awards.

4.2 Vienna Convention on the Law of the Treaties, Article 31

In addition to the rules on *what* sources may be used in an award, the Tribunal will also have to follow the rules on *how* to interpret these rules. This chapter does not aim to prove that the existence and application of rules of interpretation would automatically render the

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[133] "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough". North Sea Continental Shelf, (Federal Republic of Germany/Denmark), Judgment, I.C.J. Rep. (1969), para. 77.

[134] *Id*..

[135] *Id*..

[136] *Ibid*., Article 42(1)

[137] *Ibid*., Article 42 (2)

[138] *Ibid*., Article 42 (3)

application of the FET standard more predictable. Lauterpacht (1949) already argued that it is a fallacy to believe that the existence of rules of interpretation would safeguard against arbitrariness or partiality since the very choice of a specific rule of interpretation is grounded in the judge himself.[139] However, the fact that many Tribunals do use the VCLT as support for their interpretation is still a step in the right direction.

The primary approach by a Tribunal in interpreting a provision in an investment treaty is by invoking Article 31 of the VCLT, which provides for the approach that:

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[140]

The article constitutes the foundational rule for all interpretation in international law, including international investment law.[141] How then, has the interpretation of the FET standard been influenced by Article 31 of the VCLT? The following subchapters try to clarify this question.

4.2.1 Ordinary Meaning

Interpreting the FET standard according to its ordinary meaning provides little guidance in determining how to interpret the standard.[142] Article 1105 of NAFTA reads as follows:

> *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."* [Emphasis added][143]

There are four important elements of the minimum standard contained in Article 1105 that can be extracted using the ordinary meaning approach. First of all, it is necessary to note

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[139] Lauterpacht, (1949), page 53. To be fair, this statement was made before the VCLT had been conceived.

[140] Vienna Convention on the Law of Treaties (VCLT), Vienna 23 May 1969, In force 27 January 1980, 1155 UNTS 331. Article 31(1)

[141] In general, there is an "*unspoken assumption is that the VCLT represents customary international law."* OPIL: Vienna Convention on the Law of Treaties (2006). However, Article 4 of the VCLT provides that the rules of the treaty only apply on those treaties that have been concluded after the date that the VCLT entered into force, which is 27 January 1980. This means that BIT that have been concluded before its entry into force, are not object to the rules of VCLT. It is unclear whether it is possible to make a successful argument that there existed binding custom even before the VCLT.

[142] Dumberry (2013), page 58.

[143] NAFTA, Chapter 11 Article 1105(1)

that this article provides for an *absolute* minimum standard of treatment. As contrary examples, both the NT and Most-favored-nation (MFT) standards provided by Articles 1102 and 1102 are *relative* standards; they depend on what kind of treatment is given to nationals or other investors. Second, there is also a similar difference in relation to other articles in chapter 11, since this article only protects *investments*, not investors. Third, the article refers to international law. Some writers have referred this to this reference as "a window through to another set of rules."[144] The reference to international law may be seen as the "controlling element" in applying the article.[145] As such, the FET standard is bound by the sources of international law and cannot be determined by the individual arbitrators understanding of equity or other subjectively contributing factors.[146] Finally, the meaning of "fair and equitable" in itself deserves some attention. "Fair and equitable" should be regarded as a separate legal concept, and as such should not be confused with "equity" or "ex aequo et bono," as already pointed out.[147] The FET standard is rather something that transcends the individual words of which the standard is composed.[148] As such, the FET standard may be regarded as the rule of law with specific content.[149] However, as a famous commentator pointed out in a statement about the meaning of the standard:

> *" [F]air and equitable treatment" in Article 1105(1) represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes.*[150]

While it is debatable whether the vagueness is a conscious design in the standard, it is true that the broad wording of the standard gives the interpreting Tribunal a broad leeway to

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[144] Kinnear & others (2006), page 17.

[145] Dumberry (2013), page 58. See also, Grand River v. United States, Award, (12 January 2011), para. 174

[146] Grand River v. United States, Award, (12 January 2011), para. 174

[147] Schreuer (2005), page 365.

[148] Dumberry (2013), page 57.

[149] UNCTAD (2012), page 61. The specific elements of this content will be discussed further in chapter 5. Both in Mondev and ADF, the Tribunals have pointed out that the standard is anchored in in international law. "[A Tribunal] may not simply adopt its own idiosyncratic standard of what is "fair" or "equitable", without reference to established sources of law." Mondev International Ltd. v. United States, ICSID No. ARB(AF)/99/2, Award, (2 October 2002), para. 119. See also ADF v. United States, Award, (9 January 2003), para. 184.

[150] Brower II (2002), page 78.

apply it in practice.[151] Some commentators have pointed out the usefulness of its vagueness, while others have directed sharp critique against the lack of any clear conceptual vision of the principle's function.[152] One argument in favor of its vagueness is that it provides a useful tool against the complex nature of investment disputes. A common criticism is that the vagueness gives the arbitrations unlimited discretion to decide on investment disputes. This criticism is founded if the focus is limited to the literal meaning of the standard. However, it excludes the possibility that there is an *outer rim,* or a bordering net, that prohibits the arbitrators from interpreting the standard solely by following their idiosyncrasies. It may well be, that while the ordinary meaning of the FET standard gives the arbitrator much leeway, this interpretative freedom is nonetheless contained and limited by the legal culture in which it is being applied.

In conclusion, the "fair and equitable" is a complex legal rule of law that consists of specific elements that prohibit a certain behavior of states. Little guidance is to be had from a dictionary meaning of "fair" and "equitable," as the purpose of the words is to fill a legal function that goes beyond their literal meaning. This will be clarified in chapter 5, where the specific elements that make up the standard will be analyzed.

4.2.2 Object and Purpose

Of the various sources that a Tribunal can draw its interpretation from, the object and purpose serve as the primary guide for this task.[153] In investment treaties, the object and purpose can in most cases be found in the preamble of the BIT or FTA. The preamble text is usually supportive of things such as "economic cooperation" and "stimulating investment initiatives" between the two parties. [154]

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[151] On the historical reasons for the vagueness, see: Weiler (2013), page 188.

[152]Schreuer (2005), page 365; Vasciannie (2000), 104. On the latter view, see:Schill (2008), page 37. Schill further argues that his main concern is that "*the jurisprudence does not produce predictable results that are accepted by states but endorse an approach that allows for a broad ex post facto control of host state conduct. Predictability in its application is, however, essential for host states and foreign investors alike who need to know beforehand what kind of measures entail the international responsibility of the state and, accordingly, against which kind of political risks fair and equitable treatment protects*"

[153] Dolzer & Schreuer (2012), page 29.

[154] See for example: *Agreement between the Government of the Republic of Finland and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments*, Signed November 5, 1993. Entered Into Force May 3, 1996, where the preamble states that: "*Desiring to intensify economic cooperation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party...*

Article 102(1) of the agreement prescribes the objectives of NAFTA. Among other, fair competition and eliminating barriers to trade are listed as one of the objectives.[155] The article further obligates the parties to "*interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law*". [156] As the objectives are expressed in a very general way, it is doubtful whether they provide any additional guidance in interpreting the FET standard.[157] From this, it is possible that by including the object and purpose of the interpretation of the FET standard, the arbitrator is still left standing at the same position as before. In the end, it is up to the arbitrator's own discretion whether to emphasize the protection of the investor's interests or the regulatory flexibility of the state.[158]

In *ADF v United States,* the dispute concerned a domestic law which, according to the investor, put excessive obligations on foreign investors which violated Article 1105 of NAFTA (which contains the FET standard). The Tribunal addressed the relationship between the general objectives prescribed in the preamble of NAFTA and the specific provisions in subsequent chapters of the agreement. The Tribunal referred to them as *lex genrealis* and *lex specialis,* and concluded that the former may be seen as casting a light on the latter but that it should not be regarded as overriding and supersede the *lex spexialis* rules of interpretation.[159] An overemphasis on the *lex generalis* could in some instances go against the ordinary meaning of the *lex specialis* rules. While this reasoning is very eloquently formulated, it stands clear that the Tribunal is hesitant in utilizing the object and purpose in its interpretation.

As an example to the dangers of overemphasizing the object and purpose, the finding by the Tribunal in *Metalclad* should be mentioned. Here, the Tribunal was faced with a question whether the absence of clear rules of procedure constituted a violation of the FET

Recognizing that the promotion and reciprocal protection of such investments on the basis of an Agreement will favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives…"

[155] North American Free Trade Agreement (NAFTA) Washington D.C. December 17, 1992. In force January 1, 1994. Article 102(1) a) and b)

[156] NAFTA Article 102(2)

[157] Dumberry (2013), page 61

[158] *Id*..

[159] ADF v. United States, Award, (9 January 2003), para. 147. Other Tribunals have supported this. See for example: Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v . United States of America (Decision on Preliminary question), para. 177-179.

standard. In that case, the Tribunal came to a conclusion that "transparency" was part of the objectives of the agreement.[160] Based on this, the Tribunal used the preamble of NAFTA in interpreting Article 1105. It found that Mexico had violated the FET standard by not having respected the transparency requirement which obligated it to abide by the rules procedure.[161] This award caused a significant controversy and was later partially set aside by the Supreme Court of British Columbia on the parts where there had been a violation of the FET standard based on the object and purpose.[162] The Tribunal in question went beyond the limitations to its interpretive powers when it solely based the violation on the object and purpose. This is also an excellent example of how ignorance of the legal culture can lead to set-aside procedures like this. While there were no explicit rules on interpretation that would have prohibited the Tribunal from putting such an emphasis on the object and purpose, the Tribunal had nonetheless clearly transgressed unwritten rules of the legal culture.

In the light of object and purpose, there is another debate concerning the different approaches of restrictive and effective interpretation. The ICJ has concerned itself with the principle of effectiveness. In the *Corfu Channel* case of 1949, the Court stated that:

> *It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purport or effect.*[163]

The core of all interpretation in international law is usually attributed to the treaty text and an overarching principle of effectiveness.[164] In practice, if a restrictive interpretation is applied, then whenever there is an ambiguity with provisions granting jurisdiction over

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[160] Metalclad v. Mexico, Award, (30 August 2000), para. 70. The Tribunal stated that: *"These objectives specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties*."

[161] Metalclad v. Mexico, Award, (30 August 2000, para. 74-76. This was a controversial award, which was later set aside by a the Supreme Court of British Columbia para. Mexico v. Metalclad, 2001 BCSC 664, Supreme Court of British Columbia, Judgment and Reasons for Decision (2 May 2001), 59-76

[162] United Mexican States v Metalclad Corp, 2001 BCSC 655

[163] Corfu Channel Case, (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgement, I.C.J Rep. (1949), p. 24

[164] Michael Waibel *Demystifying the Art of Interpretation,* European Journal of International Law, page 581.

disputes between states and individuals, such ambiguity should always be resolved by maintaining state sovereignty.[165]

According to the principle of effectiveness, treaty provisions should be interpreted in a way as to give it meaning.[166] A more controversial reading of the principle would include a maxim that obligates the interpretation to give treaty provisions a "maximum effect."[167] Tribunals have adopted both the effective and restrictive ways of interpretation in investment disputes. A restrictive interpretation of investment treaties tends to favor the host state over the investor while an effective interpretation will favor the investor over the host state.[168] While either one of these approaches can be used when interpreting a treaty provision, a far more favorable approach is a balanced approach that rejects an exclusive application of either of these approaches.[169] In *Mondev v. the United States*, the Tribunal argued that:

> *In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties*[170]

The Tribunal in *Mondev* exemplified the more diverse nature of treaty interpretation that is not as easily compartmentalized in a specific way of interpretation. In addition to this, the idea that treaty provisions that limit state sovereignty need to be interpreted through a restrictive approach has largely been rejected.[171] This is mostly because the approach has been replaced by Articles 31 and 32 of the Vienna convention.[172]

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[165] *Methanex Corporation v. United States of America* Partial Award (Preliminary Award on Jurisdiction and Admissibility), para. 103.

[166] Schreuer (2011), page 1

[167] *Ibid*., page 2

[168] *Id*.

[169] Schreuer (2011), page 2

[170] Mondev v. United States, Award, (11 October 2002), para. 115. Here, the use of the word "extensive" is synonymous to "effective".

[171] Christoph Schreuer (2010), page 132. Many Tribunals have also dismissed the restrictive approach in their award. See for example: Methanex Corporation v. U.S.A., Preliminary Award on Jurisdiction and Admissibility, (3 August 2005), para. 105 & Loewen v. United States, Award (26 June 2003), para. 51.

[172] *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, (24 June 1998), para. 55.

In a dichotomy between the two, the principle of effectiveness is preferred in the international community.[173]

Tribunals that interpret through the object and purpose usually reach awards that lean in favor of effectiveness. [174] It is possible to conclude that the object and purpose give little indication on how to interpret the FET standard. In the cases where a Tribunal has supported a violation of the FET through the object and purpose, it has been controversial. Here, the reasoning made by ADF is compelling; the object and purpose can be relied upon if it supports the *lex specialis* rule in Article 1105. This ensures that the Tribunal avoids situations where the object and purpose are used in a manner that renders the FET standard unpredictable, as was the case in *Metalclad*.

4.2.3 Context

According to Article 31(1) of the VCLT, the context should be taken into account when interpreting the provisions of a treaty. This includes preambles and annexes as well as any subsequent agreements or instruments between the parties in connection with the conclusion of the treaty.[175] Other interaction between the parties, such as subsequent practice or agreements of its interpretation should also be taken into account.[176]

The first contextual detail that is of significance is the *title* of the article that reads "Article 1105 Minimum Standard of Treatment". Some authors argue that this is a clear reference to customary international law.[177] Therefore, the words "international law" mentioned

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[173] As Lauterpacht argued, "*Unlike the rule of restrictive interpretation of international obligations, the principle of effectiveness constitutes a general principle of law and a cogent requirement of good faith*." Lauterpacht (1949), page 83. See also separate opinion of Judge Higgins in the Oil Platforms Case, where she contends that: *It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses*." Oil Platforms (12 December 1996) (Separate opinion Judge Higgins), para. 35.

[174] Schreuer (2010) , page 132. See for example: Amaco Asia Corporation v Indonesia, Award on Jurisdiction, (5 June 1990), cited in Ethyl Corporation v Canada, Award on Jurisdiction, (24 June 1998), para. 55, where the Tribunal stated that: *Like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle, pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law*

[175] VCLT 31(2).

[176] *Ibid*. 31(3).

[177] See for example: Schreuer (2005), page 362.

within the article could be read as an apparent reference to the minimum standard of treatment in international law.[178]

At the implementation of NAFTA, both the US and Canada made official statements on its implementation where they, among other things, equated Article 1105 with CILMSTA. While this could not be seen as subsequent agreements between the parties under Article 31(3)(a), it is possible to argue that this constitutes subsequent practice under Article 31(3)(b).[179] A fact supporting this is that both states stand behind the same interpretation.[180] The ICJ has reaffirmed this position in its *Navigational and Related Rights* case from 2009, where it is stated that Article 31(3)(b) allows for a departure from the original intent if there exists a tacit agreement between the parties.[181] In IIA, however, Tribunals have not made the same connection. In *Mondev,* the Tribunal did not regard the official statements as a subsequent practice, rather it concluded that they serve as evidence for opinio juris.[182]

Another question with regards to the context concerns the interpretation of other BITs, especially Model BITs adopted by the parties to NAFTA and whether they can be said to influence the interpretation of the FET in article 1105. BITs that are more recent contain specific language that explicitly refers to customary international law as well as providing a more narrow definition of the FET standard.[183] Some writers argue that a Model BIT represents a set of norms that the drafting state deems to represent a reasonable and acceptable legal basis for the protection of foreign investments.[184] Whether this constitutes subsequent practice is debatable, however, there is support for this among writers.[185]

The essential problem with this approach lies in the specific wording of the VCLT. Article 31(3)(b) allows for the interpretation of subsequent practice when it has been in connection with application of the treaty in question. However, other BITs as well as Model BITs have

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[178] Dumberry (2013), page 63.

[179] *Ibid*., page 64.

[180] Roberts (2010), 221.

[181] Navigational and Related Rights, (Costa Rica v. Nicaragua), Judgement, I.C.J Rep. (2009), para. 64.

[182] Mondev v. United States, Award, (11 October 2002), para.111.

[183] US Model BIT 2012, Article 5. Canada Model BIT 2012, Article 5.

[184] Douglas (2003), page 159.

[185] Roberts (2010), 221. Lowenfield also argues that Tribunals should take into account other BITs that states have concluded as "*evidence of that states understanding of international law*". Lowenfield (2002), page 488.

no connection to NAFTA, and as such, they should not be used as a subsequent practice under the VCLT.

Finally, as mentioned above, the context of an interpretation can in light of Article 31(3)(a) of the VCLT also include any subsequent agreement between the parties that concerns the interpretation of the treaty. These subsequent agreements will be binding on any court or tribunal whose task it is to interpret the treaty. A similar provision can be found in Article 1131(2) of NAFTA, where a Tribunal established under a chapter 11 dispute is bound by interpretations made by the North American Free Trade Commission (FTC).[186] This is precisely what the parties to the NAFTA did in the early 2000s. As this event deserves a broader analysis, it will be discussed in the following subchapter.

4.2.3.1 The FTC's Notes of Interpretation

Article 1105(1) of NAFTA prescribes a minimum standard of treatment of foreign investors. The article contains a couple of controversial ambiguities that have sparked the extensive FET vs. CILMSTA debate. In short, the debate is whether the FET standard is part of CILMSTA, or whether it is something else that gives the investor higher protection.[187]

First, the article mentions "in accordance with international law," not customary international law. Here, the article is ambiguous on whether it is specifically CILMSTA that the minimum standard of treatment should accord to, or whether other sources of international law, such as general principles of law, could be used as an indicator of the standard. The second ambiguity is connected with the word "including." Here, the debate is whether the article refers to the FET standard as an example of CILMSTA, or whether it is referred to as an autonomous example of a legal standard of treatment of investors in international law. Both of the ambiguities were clarified when the state parties to NAFTA issued a binding interpretation of Article 1105(1).

On the 31st of July 2001, the FTC, consisting of the state parties to NAFTA, issued the *notes of interpretation* regarding Article 1105 where it stated that:

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[186] According to Article 1131(2): *An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.*

[187] This will be further elaborated in chapter 4.

> *"Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*
>
> *... "fair and equitable treatment" ... do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*."[188]

The notes contained several clarifications on issues that had been debated in Tribunals prior to their announcement. The issuance of the notes can be seen as a reaction to a number of arbitral awards, both concluded and pending, that had adopted an expansive reading of Article 1105.[189]

Prior to the issuance, three awards are of special importance. In *Metalclad v Mexico*, the issue concerned a revocation of a permit to construct a hazardous landfill in Mexico after it had already been constructed. As mentioned above, the Tribunal in *Metalclad* found that Article 1105 had breached since Mexico had failed to provide the investor a "transparent and predictable framework".[190] In *SD Myers v Canada,* the issue concerned a permission granted by Canada to the investor concerning the export of a hazardous chemical compound, which was later prohibited. The Tribunal found that there had been a violation of Article 1105 since Canada had breached the NT provision contained in Article 1102 of the agreement.[191] Finally, in the *Pope & Talbot v. Canada* case, the issue concerned exports limitations of softwood lumber as well as additional fees for exports that went beyond the limitations. In its award, the Tribunal found that there had been a breach of the FET standard in Article 1105, and that the standard was "*additive*" to the minimum standard contained in international law.[192]

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[188] NAFTA Free Trade Commission (July 31, 2001), North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions: A.1 and 2. According to Article 1131(2): *An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.*

[189]Kaufmann-Kohler (2000), page 181. Cases include: Metalclad Corp. v. United Mexican States, Award, (30 August 2000), para. 100-101; S.D. Myers, Inc. v. Canada, Partial Award, (13 November 2000), para. 258–649(2001); Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, (10 April 2001), para. 110

[190] Metalclad Corp. v. United Mexican States, Award, (30 August 2000), para. 99.

[191] S.D. Myers, Inc. v. Canada, Partial Award, (13 November 2000), para. 258–649

[192] Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, (10 April 2001), para. 110

The note dismissed most of the findings by the abovementioned Tribunals.[193] The note took a firm stance on the relationship between the FET standard and CILMSTA, stating that the standard do not require any additional treatment beyond the CILMSTA. This was a directed at the findings by the Tribunal in *Pope & Talbot,* who had found that the standard was "additive" to the minimum standard. The FTC note also made it clear, that a violation of another provision in NAFTA does not constitute a breach of Article 1105, and thus dismissing the findings made by the Tribunal in *SD Myers.*[194]

Some authors speculate, that one of the main reasons why the FTC note was issued at this inconvenient time is due to the fear of the parties to NAFTA that the minimum standard was driven off from its course by "ambulance chasing" investment lawyers.[195] Without a "re-interpretation" of the provisions in chapter 11, it is speculated that the NAFTA parties were concerned that the findings by the abovementioned Tribunals would set a trend that other Tribunals would follow in the future.[196]

To some writers, the FTC note can be regarded as an (successful) attempt to "change the ground rules in mid-game".[197] This method of obtaining authentic interpretations of the Treaty's meaning through an institutional mechanism has serious drawbacks.[198] It gives States the possibility to influence proceedings to which they are parties. According to Schreuer (2011), this mechanism is incompatible with principles of a fair procedure, which renders the whole process undesirable.[199] The main problem is the dual identity that the

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[193] Note that Metalclad was already the object of set aside proceedings in the Supreme Court of British Columbia. See further: United Mexican States v Metalclad Corp, 2001 BCSC 655

[194] NAFTA Free Trade Commission (July 31, 2001), North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, B(2): *A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).*

[195] Weiler (2013), page 271 At the moment when the FTC note was issued, there were many chapter 11 proceedings pending. The Tribunal in Pope & Talbot had moved to the damages phase and the notices for arbitration had been filed for Mondev, ADF, Waste Management, Loewen, Methanex and UPS, all of which concerned questions relating to minimum standard of treatment in Article 1105. Kaufmann-Kohler (2000), page 182.The Metalclad award had already been set aside with regards to the "transparency findings" and the set aside proceedings for SD Myers were pending before the Federal Courts of Canada. Dumberry (2013), page 67. See also: Mexico v. Metalclad, 2001 BCSC 664, Supreme Court of British Columbia, Judgment and Reasons for Decision (2 May 2001)

[196] Dumberry (2013), page 68.

[197] Brower (2003), page 253.

[198] Schreuer (2011), page 4

[199] *Id*.

state party to a dispute has in the proceedings.[200] It acts both as a litigant of its own case as well as a member to the FTC, which at any point in time has the authority to issue binding interpretations on the specific provisions in NAFTA, even those that are being disputed.[201]

Another problematic aspect is the distinction between interpretation and modification. While all the members of the FTC claimed that the Note was an interpretation according to Article 1131(2) of NAFTA, it is still unclear whether the interpretation actually constitutes a clarification of the meaning, or whether it de facto represents a modification of the provisions, which would constitute an *ultra vires* amendment without any binding force. [202] Even if the Note is to be considered to contain some binding force, it is doubtful whether they apply retroactively on existing disputes.[203] Brower II (2001) points out, that while there is no specific prohibition against retroactive application, Article 1131(1) still requires that the disputes are decided in accordance with international law. [204] Therefore, this practice could nonetheless be considered contrary to the principle "*nemo judex in causa sua*" (direct transl. "*no-one should be a judge in his own case*").[205]

Finally, the FTC note can be regarded as an attempt to reconnect the FET standard with CILMSTA. It also sheds light on an ongoing struggle between states and Tribunals over the final power to interpret the investment treaty and its subsequent provisions.[206]. It is possible to speculate whether the equation of the FET standard with CILMSTA means that the FET standard is "submerged" to CILMSTA or whether the states regards the minimum standard as having evolved and risen to the level of the FET standard. The wording of the reinterpretation, especially the usage of sentences such as "in addition or beyond that which is required by that [CILMSTA] standard", and "do not create additional substantive rights" does not give one much encouragement to these speculations. It is fairly clear that FET standard has been "submerged" to the level of CILMSTA.

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[200] Kaufmann-Kohler (2000), page 192.

[201] *Id*.

[202] Brower II (2001), page 57.

[203] *Id*. (see fn.) Kaufmann-Kohler also argues that the only interpretations rendered prior to the start of an arbitrations should be binding on the tribunal. Kaufmann-Kohler (2000), page 193.

[204] Brower II (2001), page 57.

[205] While the US did not act as a judge per se, they did use their authority in a manner that de facto influenced the Tribunal in a binding way. The US position in the FTC could therefore be compared to judging their own case, if it is able to influence pending disputes to which they are part of.

[206] Schill (2009), page 269-270.

4.2.3.2 The implications by the FTC note on the FET-CILMSTA relationship

As mentioned above, the FTC note equated the FET standard to CILMSTA. [207] This was in direct opposition to the findings in *Pope & Talbot*, where the Tribunal had found that the FET standard constituted something "additive" to the CILMSTA.[208]

As the FTC note "corrected" their conclusions, it reaffirmed that the reference to international law was actually a reference to customary international law. One might ask what the importance is in pointing out the difference. Judge Schwebel has argued that international law, by going beyond customary international law, includes conventions and treaties that encompass a load of almost 3000 BITs.[209] While the sources for proving the standard in customary international law are limited and hard to prove, the ability to use general practice in BITs would significantly lighten the investors burden of proof.

It is well recognized in international law, that if a party relies on a rule of customary international law, it is first obligated to establish that the custom is binding on the other party.[210] Trough the FTC note, the investor who is claiming a breach of the FET standard under NAFTA is, in fact, claiming that there has been a breach of a rule in customary international law. In turn, this means that the investor needs to prove both state practice and opinio juris, and that the alleged breach in the individual case amounts to a breach of the customary international law rule. This is problematic for the investor, as the bar is usually set high for there to be a breach of these rules in customary international law.

What is interesting is that the new interpretation was issued in the middle of the proceedings between *Mondev v. the United States,* where one of the critical issues at hand was precisely Article 1105 (1) of NAFTA. While the investor did not dispute the right of the state parties to issue binding interpretations by Article 1131 of NAFTA, they argued that this right should conform to good faith when interpreting and applying the treaties.[211] The US position in *Mondev* was that all previous awards where the FET standard had been

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[207] NAFTA Free Trade Commission (July 31, 2001), North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions: B: *"fair and equitable treatment" ... do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*

[208] Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, (10 April 2001), para. 110

[209]Mondev v. United States, Transcript of Pleadings (day 1), (11 October 2002), page 253-254

[210] See further: Asylum Case, (Colombia v. Peru), Judgement, I.C.J. Rep. (1950), page 276 where the court stated that: *The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party*

[211] Mondev v. United States, Transcript of Pleadings (day 1), (11 October 2002), page 224-225

considered as additive to the minimum standard in customary international law were erroneous interpretations of Article 1105 (1). [212]

After the FTC had issued its notes of interpretation, the whole discussion on whether there existed a difference between the FET standard and the minimum standard of treatment was retired mainly as the Tribunals amended their interpretations by the Note. In *Methanex*, the Tribunal contended that:

> *In the light of these factors, the Tribunal has no difficulty in deciding that the FTC's Interpretation of 31st July 2001 is properly characterized as a "subsequent agreement" on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention*.[213]

The main success from the perspective of the state parties to NAFTA was thus that a) the FET standard did not give any additional protection to investors than that which was protected under CILMSTA which b) significantly increased the investor's burden of proof. The actual content of the CILMSTA will be discussed further in chapter 5.

4.3 Vienna Convention of the Law of the Treaties, Article 32

Article 32 of the VCLT prescribes for supplementary means of interpretation. These supplementary means should only confirm the interpretation of primary means of interpretation prescribed in Article 31 of the VCLT.[214] According to Article 32, supplementary means of interpretation may also be used when an interpretation according to Article 31 leaves the meaning ambiguous, obscure or renders the whole result of the interpretation absurd or unreasonable.[215] In the following subchapters, it will be analyzed how the supplementary means of interpretation has been taken into account in IIA.

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[212] Mondev v. United States, US Rejoinder, (1 October 2001)., page 15

[213] Methanex Corporation v. U.S.A., Award, (3 August 2005), para 21.

[214] On primary sources of interpretation, see ICJ statute, Article 38 which includes:1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2) international custom, as evidence of a general practice accepted as law; 3)the general principles of law recognized by civilized nations.

[215] VCLT Article 32 a) and b)

4.3.1 Travaux Préparatoires

According to Article 32 of the VCLT, a Tribunal may have recourse to preparatory works when interpreting a treaty.[216]

In the context of NAFTA, Tribunals have referred to the preparatory works of the agreement.[217] However, before the Free Trade Commission published the negotiation history of chapter 11 in 2004, the *de facto* possibility for a claimant to present arguments based on the preparatory works were limited.[218] This was argued by the Claimant in in *Methanex*, who challenged the fact that the US had made a case about the "historical context" of Article 1105 before the Tribunal.[219] This was arguably unfair, as the US had the benefit of having exclusive access to the drafting material, that in turn made it impossible for the Claimant to make a reasonable counter-argument. However, the US argued that the Claimant had failed to show the materiality of the preparatory works, maintaining that it the requirements set out in Article 32 had not been met.[220] The Tribunal sided with the US in arguing that the Claimant had not sufficiently established why interpretation according to Article 31 of the VCLT would have reached the criteria laid out in Article 32 of the VCLT.[221] In general, the Tribunal expressed its reservation against Article 32 in stating that:

> *"…[P]ursuant to Article 32, recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation*."[222]

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[216] *Ibid*. 32

[217] See for example: Grand River Enterprises Six Nations, Ltd., et al. v. U.S.A, Decision on Objections to Jurisdiction, (20 July 2006), para. 35.

[218] Schreuer (2010), page 138. See further: Global Affairs Canada, 13 August 2013.

[219] Methanex Corporation v. U.S.A., Award, (3 August 2005), part II, Chapter H, para.4.

[220] *Ibid*., Chapter H, para.11. The US argued that the claimant had failed to show that a) the document would not confirm the ordinary meaning of the NAFTA provisions, b) that the ordinary meaning would leave the meaning ambiguous or obscure or c) lead to a result which was manifestly absurd or unreasonable.

[221] Methanex Corporation v. U.S.A., Award, (3 August 2005), part II, Chapter H, para. 19.

[222] *Ibid*. Chapter B, para. 22.

It is clear that the preconditions in Article 32 need to be met before one can have recourse to preparatory works. However, the restrictive approach by the Tribunal should nonetheless be put under further scrutiny. Article 32 states that "*Recourse may be had to supplementary means of interpretation … in order to confirm the meaning resulting from the application of article 31…".* However, this only applies to *interpretation.* The problem in the abovementioned case was that the Claimant was not allowed to get access to the preparatory works due to its inability to prove that one of the three conditions of Article 32 was met. The Tribunal mixes up the right to review the preparatory norms and the right to *use* them as a supplementary means of interpretation. Since most of the preparatory works are accessible to all parties to NAFTA chapter 11 proceedings today, this question is largely settled.

The Tribunal in *Pope & Talbot* took another approach by arguing that the negotiating history was necessary to interpret the FET standard since Article 1105 contained ambiguities in the mind of the Tribunal.[223] It concluded that the preparatory work did not support Canada's claim that the words "international law" contained in Article 1105 were references to customary international law.[224]

Despite this, it is questionable whether the interpretation of the FET standard is ambiguous to the extent that it would justify having recourse to the preparatory works.[225] Article 32 of the VCLT is aimed at situations where there exist no other sources from which the interpretative body can draw definite conclusions. As it can be witnessed especially through the FTC note, all the parties to the agreement have been very active in utilizing different ways of clarifying the content of the provision, which prima facie renders Article 32 superfluous.

4.3.2 Interpretive Authority of Previous Awards

As mentioned at the beginning of the chapter, Tribunals can rely on subsidiary means of interpretation in determining primary sources.[226] These subsidiary means include previous awards by investment Tribunals. A coherent case law strengthens both the predictability

[223] Pope & Talbot Inc. v. Canada, Award in Respect of Damages, (31 May 2002), para. 26.

[224] *Ibid*, para. 46.

[225] Dumberry (2013), page 88.

[226] ICJ Statute 38(1)(d)

and authority of decisions and Tribunals are increasingly referring to and discussing earlier awards.[227] While the process is slow, some writers argue that there is a progressive emergence of more concrete rules through the emergence of consistent cases within certain issues.[228]

As there is no rule of *stare decisis* in IIA, an award given by a Tribunal constitutes an ad hoc decision between two disputing parties. [229] In NAFTA this has even been made explicit, since Article 1136(1) states, "*An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.*"[230] This closely resembles the statute of ICJ, which states, "*The decision of the Court has no binding force except between the parties and in respect of that particular case*."[231] Nonetheless, Tribunals do make references to other Tribunals in their awards. This is especially the case when interpreting the FET standard. Of course, it is impossible to say to which degree other Tribunals influence arbitrators, but the number of references to other awards speak for themselves.

The relationship towards previous awards has been discussed in several cases.[232] In *Glamis Gold*, the Tribunal stated that

> "*…[A] NAFTA tribunal*, *while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so.*"[233]

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[227] Schreuer (2010), page 139 and 156 & Commissions (I) (2007), page 6.

[228] Kaufmann-Kohler (2006), page 373 & Commissions (II) (2007), page 130.

[229] Schill (2009), page 288. See also: Kinnear & Bjorkland (2006), page 1136-3 and Schreuer & Weiniger (2007), page 2. The ICSID Convention (1966), Article 53, which provides that "*The award shall be binding on the parties[…]*". According to the principle *Expressio Unius Est Exclusio Alterius,* one can draw the conclusion that awards are only binding on the parties.

[230] NAFTA Chapter 11. Similarly, the ICSID Convention limits the binding effect of an award to the parties. ICSID Convention, Article 53(1).

[231] ICJ Statute Article 59

[232] Glamis v. United States, Award, (8 June 2009), para. 8-9. Grand River Enterprises Six Nations, Ltd., et al. v. U.S.A, Decision on Objections to Jurisdiction, (20 July 2006), para. 61. Methanex Corporation v. U.S.A., Award, (3 August 2005),, para. 6. Pope & Talbot Inc. v. Canada, Award in Respect of Damages, (31 May 2002), ft. 108.

[233] Glamis v. United States, Award, (8 June 2009), para. 8. In that case, the tribunal supported its argument on the separate opinion of T. Wälde in *Thunderbird Gaming Corp*, where he stated that "*In international and international economic law – to which investment arbitration properly belongs – there may not be a formal 'stare decisis' rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can*

In the case at hand, the Tribunal was especially referring to its departure from the "major trends" established around the interpretation of the FET standard in Article 1105.[234] This is a very sound approach when concerned with the predictability of the awards. However, it is questionable whether Tribunals feel this sense of obligation when departing from "major trends." In the *Feldman* case, for example, the Tribunal did not mention "major trends" when discussing previous awards, rather, it argued that it was the fact that the parties had relied extensively on previous awards that made it appropriate to discuss them.[235]Despite this, it is undoubtedly the case that Tribunals are influenced by previous awards, and as it will become apparent in the next chapter, the interpretation of the FET standard is a product of extensive discussion between the Tribunals that have applied it. It is safe to say that the legal culture surrounding the interpretation and application is "live and kicking" meaning that Tribunals are clearly conscious of their surrounding legal culture and are consequently influenced by it to a certain degree.

While it is not possible to talk about a clear and consistent case law within IIA, topical issues such as a violation of the FET standard seem to at least pull many arbitrators in the same direction. For example, many Tribunals have consistently abandoned bad faith as a precondition for reaching the threshold of a violation of the FET standard, which could serve as proof of some internal consistency.[236] On the other hand, some writers criticize the integral unpredictability of IIA which remains unaffected by consistent case law.[237] They argue that it is not so much the lack of invoking previous awards as precedents that is the cause of the lack of predictability; it is instead the categorically weak reasoning that is integral to the interpretation and application of the standard.[238] On this point, I regard consistency as supportive of predictability, regardless of quality in the reasoning. As I mentioned in the beginning, rules and their application are ideally predictable in a good way. Here, rules and their application are based on codified behavior that is already being

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and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not 'confronting' established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence. The role of precedent has been recognised de facto in the reasoning style of tribunals, but can also be formally inferred from Art. 1131 (1) of the NAFTA – which calls for application of the 'applicable rules of international law". Thunderbird v. Mexico, Separate Opinion, (26 January 2006), para. 129.

[234] Glamis v. United States, Award, (8 June 2009), para. 8

[235] Marvin Roy Feldman Karpa v. United Mexican States, Award, (16 December 2002), para. 107.

[236] Kaufmann-Kohler (2006), page 372. See also: Glamis v. United States, Award, (8 June 2009), para. 616..

[237] Schill (2006), page 37.

[238] *Id*.

acted out by the community, which automatically renders the rules predictable. Then there is another way predictability, where the rule is not based on codified behavior but instead on the individual discretion of the agent in power. Here, the rule and its application can indeed be consistent and as such function as a predictable rule for future conduct. In this case, it is obviously preferable that the FET standard be predictable in a good way. It will be the object of the following two chapters to determine, whether the reasoning really is that weak and whether the FET standard can be regarded as something that is already being acted out among states.

5 Specific Interpretation the FET Standard

When disputing about the relationship between the two standards, there is a presumption that, if they are separate, the CILMSTA requires a serious violation by the state while the FET standard is more sensitive of the investor's rights. The "notes of interpretation" resolved this inherent ambiguity, as it clarified that the FET standard was included in the minimum standard of treatment. However, the note did not clarify *what* the standard is.

With regards to the theoretical approach, the purpose of this chapter is to find a definition, or to outline, "hole in the net." It will try to familiarize with the legal culture where Tribunals, states and investors have attempted at defining the FET standard. As it was clarified in chapter 4.2.3.1, the FET standard has been equated to the CILMSTA, and as such, this chapter will be satisfied in providing an abstract definition of *what* the CILMSTA is.[239]

The definition of CILMSTA is highly dependent on whom one asks. If one turns towards the state, the standard will undoubtedly be connected with the strict "egregious" standard that was coined in the Neer case. Understandably, investors argue in favor of a liberal interpretation of the standard while Tribunals are stuck between these opposing views.

5.1 The Autonomous Approach and "Ex Aqueo et Bono"

Before moving into the discussion on the definition of CILMSTA, this chapter will give a brief overview of the *autonomous approach* that was prevalent before the FTC note. This

[239] I use "CILMSTA" and the "minimum standard" interchangeably, as they both refer to the same standard.

approach can still be witnessed in investment arbitration that concerns BITs which have not amended the wording in the provision that limits the FET standard to CILMSTA. [240]

The autonomous approach is a way of interpreting the FET standard where the words are given a literal meaning. It is therefore a straightforward assessment of whether the treatment of an investor has been both "fair" and "equitable."[241] The autonomous approach is supported by the fact that fair and equitable treatment has usually been pronounced without any subsequent clarifications, which would support the idea that the expression is so readily understood that states have agreed on the meaning and that it should as such be understood in its literal sense.[242] Arguably, this is also supported by the rules of interpretation in international law.[243]

The main problems with this approach are that different legal cultures might have a different understanding of the meaning of "fair" and "equitable." The second problem is the subjective nature of the interpretation. This approach does not support its interpretation of an established body of law, rather the plain meaning of the FET standard is only drawn from the factual situation which in turn risks conflicting interpretations in practice.[244] Therefore, this approach gives the arbitrators free hands to apply the FET as a subjective standard. There is strong critique against this, as the decision of the tribunal would allgedly in this case be *de facto* given trough "ex aqueo et bono" which would go against NAFTA 1131(1) and Article 42(3) of the ICSID Convention.[245] It is hard to delimit the difference

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[240] See for example: *Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, Signed November 14, 1991; Entered into Force October 20, 1994 "2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full Protection and security and shall in no case be accorded treatment less than that required by international law". *Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments*, Signed March 3, 2004, Entered Into Force February 5, 2005: "Article 2. 1. Each Contracting State shall, subject to its laws and regulations, at all times ensure fair and equitable treatment to the investments of nationals and companies of the other Contracting State". See further: Oko Pankki Oyj & others v. Estonia, Award, (19 November 2007).

[241] UNCTAD, Fair and Equitable Treatment (1999), page 10

[242] *Id*.

[243] VCLT Article 31 (1) "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Emphasis added]

[244] UNCTAD, Fair and Equitable Treatment, 11(1999)

[245] Weiler (2013), page 242. According to Chapter 11 in NAFTA: Article 1131: Governing Law1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. For a definition on Ex Aqueo et Bono, see: OPIL: Ex Aqueo et Bono (2009). Article 42 (3) of the ICSID Convention only allows for decision to be given *Ex Aqueo et Bono* if the parties agree to it.

between judging after "what is right and good" and judging according to the literal meaning of "fair" and "equitable."

There is a contrary way of looking at this problem. It is possible to take the view that the FET standard does not in fact, like ex aqueo et bono, allow for the arbitrator to apply the standard subjectively by merely basing the award on his or her idiosyncrasies.[246] The FET standard does not allow for an "*open-ended mandate to second guess government decision making*," rather, it grants the arbitrators the discretion to decide what has constituted an unreasonable act.[247] This view takes the position that the FET standard provides higher protection than the minimum standard, in that both require the state conduct to display inappropriateness, but the FET standard requires a relatively lower degree of the inappropriateness.[248]

It is questionable whether this makes any difference in reality. We could once again refer to the famous expression "*law is what judges do rather than what they say they do*." Ultimately, the arbitrator has to decide based on the specific facts of the case, what is unreasonable in his mind. One could argue that there merely exists a semantic difference to deciding the matter ex aqueo et bono. This does not mean that the awards would be arbitrary or unpredictable, far from it. It is more a question of the theory and attitude of how the judicial community views arbitrators. [249]

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[246] Newcombe & Paradell (2009), page 275. The authors cite the Tribunal in *Saluka Investments B.V. v. The Czech Republic*, Partial Award, (2006), para. 284: *This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision ex aequo et bono. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the 61 basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in S.D. Myers has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making". The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.*

[247] *S.D. Myers v Canada*, Partial Award, (Nov. 13, 2000), para. 261.

[248] Newcombe & Paradell (2009), page 276. See further: *Saluka Investments B.V. v. The Czech Republic*, Partial Award, (2006), para. 292-293, where the Tribunal pointed out that *"Bilateral investment treaties, however, are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors' protection by the "fair and equitable treatment" standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness."*

[249] One could almost argue that there exists a pathological fixation on "objectivity" which forces the community of arbitrators to justify their own sense of fairness by adhering to "objective standards".

As mentioned above, the FTC commission included the FET standard with CILMSTA, and as such, it is not necessary to elaborate on the autonomous approach any further.[250] The next discussion, however, is where the threshold for the minimum standard exists.

5.2 The Definition of the Minimum Standard

The state parties to NAFTA have consistently advocated that the interpretation of the FET standard should follow the Neer interpretation, regardless of the factual circumstances in the case.[251] The Neer interpretation is a reference to a test applied in the Neer Case, adjudicated by the General Claims Commission between the US and Mexico.[252] In that case, the issue concerned the death of an American citizen, Paul Neer, who had been killed by a group of armed men. While the culprits had no connection to the Mexican government, the family of Mr. Neer argued that the "*Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprit*s."[253] The General Claims Commission dismissed the claim against the Mexican state, as the acts had not reached the threshold of state responsibility:

> *"The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency."* [Emphasis added][254]

This test functioned as a standard for other awards as well.[255] The Neer standard is seen as portraying the "egregiousness" which is required from the action of the state. The US has pleaded for the application of this test in all cases brought against it under NAFTA.[256] This constitutes the starting point in the discussion of the threshold for the minimum standard.

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[250] In all likelihood, a potential FTA between the EU and the US would contain the revised version of the FET standard, which would conform to the interpretation of the FTC.

[251] Weiler (2013), page 247

[252] For a complete account of the awards, see: Reports of International Arbitral Awards, 2006.

[253] United States (L.F. Neer) v. United Mexican States (1926), page 61

[254] United States (L.F. Neer) v. United Mexican States (1926), page 61-62, para. 4

[255] B. E. Chattin (United States.) v. United Mexican States, page 287, para. 10.

[256] Weiler (2013), page 247.

The crucial question is, therefore, whether customary international law has evolved since 1926 or whether the same standard still applies today, as it has been frozen in time?

5.2.1 The Frozen Customary International Law

In *Glamis v. the United States*, the Tribunal argued that it was the Claimants burden to prove that the minimum standard has evolved and as such requires less than the "egregious," "outrageous" or "shocking" standard set out in Neer.[257] The case concerned a Canadian corporation engaged in mining, which had allegedly suffered injuries due to governmental regulations that had effectively denied its investments the minimum standard of treatment according to Article 1105. The Tribunal pointed out that proving that customary international law has changed is difficult, and the investor's failure to prove it effectively *freezes* the protections provided in Article 1105 to the standards of "egregiousness" expressed in the Neer case.[258]

In determining the evolution of the standard, the Tribunal limited the progress to two possible types, (1) that the CILMSTA has moved beyond what it was in 1926 or (2) the public views on "outrageous" may have changed over time.[259] The Tribunal rejected the first type of evolution of the standard due to the abundant use of adjective modifiers in contemporary arbitration, such as "*gross* denial of justice" or "*manifest* arbitrariness," that evidenced a strict standard similar to that which was expressed in the Neer case.[260] It pointed out that the CILMSTA is, in fact, a *minimum standard,* and in that sense, the level of scrutiny is the same as it was in the 1920s.[261]

The Tribunal asserted that the FET standard is subject to the second type of evolution, namely that there has been a change in the international view of what constitutes "shocking" and "outrageous."[262] It supported its argumentation on the *Mondev* award,

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[257] Glamis v. United States, Award, (9 June 2009), para. 601.

[258] *Ibid*. para. 601-604.

[259] Glamis v. United States, Award, (9 June 2009), para. 612

[260] *Ibid*. para. 614. The Tribunal made a reference to the following awards: "gross denial of justice" and "manifest arbitrariness" (International Thunderbird, Award, ¶ 194 (Jan. 26, 2006), "in such an unjust or arbitrary manner." (S.D. Myers, Partial Award, ¶ 263 (Nov. 13, 2000)) and "The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome ...." Mondev v. United States, Award, (11 October 2002),

[261] *Ibid*. para. 615-616

[262] *Id*.

where the Tribunal in question pointed out that the Neer was decided at a time when the status of protecting both individuals and foreign investments was far less developed than they have since come to be.[263] The *Glamis* Tribunal agreed with this, as it held that when applying the Neer standard, it is possible that the general public might find events shocking and outrageous that might not have reached this level in the past.[264]

Based on this, the *Glamis* Tribunal came to an interesting solution. On the one hand, the fundamentals of the Neer standard, requiring that acts are "outrageous" or "shocking," was still applicable while on the other hand, the meaning of "outrageous" and "shocking" has indeed changed over time since the Neer case. [265] This allows for the Tribunal to reject the notion that custom has changed since Neer while at the same time adopting a liberal interpretation of what can be considered as outrageous and shocking by today's standards.

One could argue, that the approach taken in *Glamis* is indeed an evolved interpretation that has been made to look like the rigid standard formulated in the Neer case. As one writer points out

> "*[t]he veracity of this premise will ultimately depend on how each tribunal evaluates changes in mentality towards what it considers to be 'egregious' and 'shocking.'*"[266]

Another example of interpreting the standard as "frozen in time" was argued by the Tribunal in *Cargill Inc. v. Mexico*. The Tribunal took a similar approach as the *Glamis* Tribunal when it observed that there was a trend towards adopting the standard formulated in Neer to more complicated contemporary economic situations.[267] The Tribunal still maintained that the severity of the conduct still needed to reach the standard formulated in Neer.[268] The *Cargill* Tribunal did not comment on whether the notions of "shocking" or "outrageous" had evolved to current standards. However, it still held that the FET standard at least reflects an adoption of the Neer standard to current conditions. This was because all

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[263] *Id*.

[264] *Id*.

[265] Dumberry (2013), page 110

[266] Dumberry (2013), page 111.

[267] Cargill, Inc. v. Mexico, Award, (18 September 2009), para. 284.

[268] *Id*.

concrete violations of the standard, such as denial of justice, have to be "'*gross,' 'manifest,' 'complete,' or such as to 'offend judicial propriety*.".[269]

In conclusion, the term "frozen" might be a misleading word for describing this interpretive approach. It is clear that no Tribunal is ready to apply the Neer standard by pretending to go back in time to the 20s. Rather, the "frozenness" refers to a strict standard that requires serious misconduct by the state for it to be responsible. It should be mentioned that the ICJ has also dealt with the question of the evolution of the interpretation of treaties. In the *Aegean Sea* judgment, decided in 1978, the Court argued that in cases where a state commits itself to a specific course of action (in that case the issue concerned territorial status), there is a presumption that the meaning of the expressions used in the commitment is meant to follow both the evolution of the law as well as the contemporary meaning attached to the expression by the law in force.[270] This reasoning seems to be in line with the approach adopted by *Glamis Gold.* It is important to notice that the meaning of a rule can evolve while still staying the same. A good example of this is voting equality. While the same principle of equality among voters still applies, the contemporary meaning is widely different than it was a hundred years ago. That is also the case in *Glamis Gold.* The "gist" with the Neer approach is that it reflects the action with the reaction of the international community. The reaction by "every reasonable and impartial man" is a concept that refers to a commonsensical way of determining whether an act is good or bad.[271] In this way, it is justified to argue that the Neer approach has

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[269] *Ibid*. para. 285-286. The tribunal went on to state that "*If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the Neer claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment*.".

[270] Aegean Sea Continental Shelf, (Greece v. Turkey), Judgment, I.C.J. Rep. (1978), page 33 para. 77. The Court stated that: "*While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a state, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject matters, is of a generic kind. Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time"* [Emphasis added]

[271] United States (L.F. Neer) v. United Mexican States (1926), Page 61-61, para. 4. A contextual usage of this test would be to accept, that the Neer approach does *not* exclude the reaction of women, but that it merely refers to the median human would react to a certain action.

evolved to adapt to the "contemporary reactions" of the world community while still staying faithful to the ordinary expressions in the Neer case.

5.2.2 The Evolved Customary International Law

Some Tribunals have rejected the standard applied in the Neer case. In *Mondev,* the Tribunal pointed out that the Neer approach did not suffice as a standard of treatment in investment disputes since the circumstances in the Neer case were completely different.[272] The Tribunal also pointed out that the substantial and procedural rights of the individual has developed significantly in international law and came to the conclusion that modern conceptions of unfair and inequitable actions might not be equated with that which was outrageous in the 1920s.[273] How then, in the Tribunals view, should the FET be defined? At the moment, the Tribunal had merely stated of what the standard did *not* consist.[274] In an attempt to define the FET standard, the Tribunal argued that a judgment of which actions are in accordance with the FET standard cannot be reached in the abstract; rather it must be dependent on the facts of the particular case.[275] It is reasonable to assume that the Tribunal wanted to avoid the risk of sounding like it was supporting an *ex aqueo et bono* interpretation of the standard. This is because the Tribunal added that it was indeed bound by the minimum standard established by state practice and jurisprudence of arbitral awards and underlined that a Tribunal could not "*adopt its own idiosyncratic standard of what is "fair" or "equitable," without reference to established sources of law*."[276]

The Tribunal in *ADF* concurred with the findings in *Mondev* and argued that there be no logical connection why the standard applied in Neer should be extendible to contemporary treatment of foreign investors by host states.[277] Both Tribunals argued that custom could

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[272] Mondev v. United States, Award, (11 October 2002), para. 115. In the Neer case, the issue concerned Mexico's responsibility for the failure to carry out an effective police investigation of the murder of a US citizen.

[273] *Ibid*. para. 116.

[274] To make a reference to the theory, the Tribunal had in other words only focused on the surrounding fishnet.

[275] Mondev v. United States, Award, (11 October 2002), para. 118.

[276] Mondev v. United States, Award, (11 October 2002), para. 119.

[277] ADF v. United States, Award, (9 January 2003), para. 181.

not be limited to the 1920s and as such that the minimum standard is in a constant process of development.[278] Many later Tribunals have endorsed this approach.[279]

The evolution of custom is undoubtedly a fact.[280] However, the problem lies in the lack of any further elaboration of what this evolution entails. A majority of Tribunals have concluded that the minimum standard has evolved simply by recognizing that contemporary custom, entailed in the minimum standard, is affected by the extensive network of BITs.[281] First of all, the definition of the FET standard in other BITs is equally vague, and many clauses do not have the same wording as expressed in Article 1105, where the FTC's interpretative note clearly emphasized the importance of every word. Second, while the vast network of BITs might prove the existence of state practice, this does not indicate opinio juris on its own.[282] Neither *Mondev* nor *ADF* have taken upon themselves to analyze state practice and opinio juris that would show the evolution of the standard.[283] Many authors have argued that investment Tribunals have efficiently circumvented the FTC note by making the CILMSTA itself more flexible and by doing this, they have expanded their power.[284]

In the case of investment protection, few are disputing that there exists state practice. For us to conclude that BITs can be used as evidence of existing customary international law, it would have to be shown that the reason states sign BITs is either to conform to a legal obligation or, more specifically, to clarify what the legal obligation is. The argument here is that states signs BITs to clarify investment protection standards that already exist as a part of customary international law.

In *Mondev*, the Tribunal noted that states had obliged themselves on a widespread basis to accord foreign investment treatment to the standards of fair and equitable treatment.[285] This led the Tribunal to conclude, "*Such a body of concordant practice will necessarily*

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[278] Mondev v. United States, Award, (11 October 2002), para. 123. ADF v. United States, Award, (9 January 2003), para. 179.

[279] Gami Investments, Inc. v. Mexico, UNCITRAL, Award, (15 November 2004), para. 95., Thunderbird v. Mexico, Award, (26 January 2006), para. 194. and Chemtura v. Canada, Award, (2 August 2010), para. 121

[280] Dumberry (2013), page. 108 & Kläger (2011), page 76.

[281] Kläger (2011), page 76.

[282] *Id*.

[283] Dumberry (2013), page 109.

[284] Schill (2009), page 275; Kläger (2011), page 76; Dumberry (2013), page 109.

[285] Mondev v. United States, Award, (11 October 2002), page 40, 117

have influenced the content of rules governing the treatment of foreign investment in current international law."[286]

The main opponents to the suggestions about emerging customary international law argue that there is a lack of *opinio juris*.

> "*The repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law [...] To sustain such a claim of custom one would have to show that apart from the treaty itself, the rules in the clauses are considered obligatory*".[287]

It could be argued that states recognize the existence of the FET standard as a rule contained in customary international law, and as such they merely include the FET standard as a way of *codifying* an already existing opinio juris.

There is no reason to draw a definite conclusion on the question. Some authors have suggested an alternative that lies somewhere in the middle. In a dispute between a state and an investor, where there does not exist a BIT between the host and the home state, the Tribunal could take into account other BITs that the host state has concluded and in this regard apply them as "*evidence of that states understanding of international law*."[288] However, in the context of NAFTA, this approach does not support the argument that the worldwide network of BITs could be taken as collective evidence for the existence of a singular, unified opinio juris.

In light of the abovementioned debate around the definition of the FET standard, one definitive conclusion that can be drawn is the high threshold that the standard requires of the acts. This is even more the case after the FTC note that effectively included the FET standard in CILMSTA, which made the standard formulated in the Neer case as the primary point of reference when it comes to determining severity. While some Tribunals questioned the how the Neer case bears any relevancy in customary international law, they nonetheless adhered to the test of the international community. This is also the main takeaway of the Neer standard, as it sets out a metric for the international culpability of the act prohibited by FET and CILMSTA. The standard formulates a theoretical situation in

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[286] *Id*.

[287] Guzman (1997), page 685-686.

[288] Lowenfield (2002), 488. This is of course assuming that the jurisdiction would have been established through some other means proscribed in the ICSID Convention

which the arbitrator should imagine how the general community would receive the culpable acts in question. It is by no means enough that the act simply "raises some eyebrows," but that it has to be characterized as something "egregious," "outrageous," or "shocking."[289] From a theoretical point of view, it is therefore obvious that the FET standard does not protect the investor from normal business-related risks. In addition to this, the investor is neither protected acts that might be considered as having been conducted in bad faith insofar as the acts fall short of something "egregious," "outrageous," or "shocking" to the impartial individual.

6 Application of the FET Standard

So far, the thesis has been concerned with the theoretical interpretation of the FET standard. The discussion on the minimum standard of treatment and the different degrees of "outrageousness" has been an attempt to clarify the theoretical threshold for violation the standard. This chapter will move into a more concrete part of its application. Here, the focus is on how the standard is applied in concrete cases. This is where the fact of the cases will touch with the standard. Hopefully, this will give a better understanding of what constitutes " or "egregious" s in reality. As the *Mondev* tribunal pointed out, "*[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case*."[290] From a theoretical point of view, this chapter moves into the phase of defining the "lines in the net," which localize the boundaries of the standard. The standard is divided into different sub-elements. They serve the purpose of giving a concrete conceptualization of the standard.

Before moving into the substantial material regarding the standard, it is necessary to clarify that there are many different concrete elements of the FET standard. These elements have materialized by being applied by Tribunals. The relationship between the FET standard and the subsequent elements can be defined as an "*umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific*

[289] See for example: Glamis v. United States, Award, (8 June 2009), para. 601, where the Tribunal applied the Neer standard in connection to Article 1105.

[290] Mondev v. United States, Award, (11 October 2002), para. 210.

contexts."[291] The specific elements are concrete ways in which the FET standard is actualized.[292]

The following elements of the FET standard are: legitimate expectations, transparency, the principle of good faith and due process. This is a non-exhaustive list and the different categories may differ depending on the Treaty, author and Tribunal.[293] This is important to note since many BITs and FTAs do not mention the specific subcategories just listed. Schill (2009) points out that Tribunals treat the elements of the FET standard '*as if they constituted an authoritative interpretation by the contracting parties and were binding upon the Tribunal*.'

In the following chapters, this thesis analyses the central elements that constitute the core of the FET standard. The purpose of going through these elements is not to provide a detailed guideline of how the elements have been put to action in concrete cases; rather the aim is to give different perspectives from which reoccurring tendencies in the legal culture can be extracted.[294]

6.1 Due Process

The FET standard embodies the requirement that a host state has to treat foreign investors by the rule of law.[295] Due process is a critical component in the concept of the rule of law and constitutes a stand-alone element of the FET standard.[296] A stand-alone element means that a violation of this element constitutes a direct violation of the FET standard (as

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[291] ADF Group v. United States, Second Article 1128 Submission of the United Mexican States (22 April 2002), p. 8 and Pope & Talbot v. Canada, Fourth Article 1128 Submission of the United States (1 June 2000), para. 8. The Tribunal in question also stated that: "[F]air and equitable treatment" is provided as an example of the customary international law standards incorporated into Article 1105 (1). The plain language and structure of Article 1105 (1) require those concepts to be applied as and to the extent that they are recognized in customary international law. It are not to be applied in a subjective and undefined sense without reference to international custom.

[292] Many authors have provided formulated comprehensive lists of what they regard as being the "core elements" of the FET standard. See for example: Schill (2006), page 11, UNCTAD (2012), page XVI and OECD (2004), page 26. In this thesis, I have decided to follow the categorization developed by Dumberry (2013), as it provides one of the most comprehensive illustrations of the elements in a NAFTA context.

[293] Compare for example the NAFTA Article 1105 (1) with CETA Article 8.10. In CETA, the parties have been much more concerned with actually defining the different measures that constitute a breach of the FET standard.

[294] For a comprehensive works on the constituent elements of the FET standard, see for example: Dumberry (2013), Diehl (2012), Dolzer & Schreuer (2012), Kläger (2011) and Kinnear & Bjorkland (2006).

[295] Vandevelde (2010), page 49.

[296] Schor (2006), page 2 and Dolzer & Schreuer (2012), page 154.

opposed to situations where several elements need to be breached for a violation of the FET standard). In general, if the investor has not been given due process, this constitutes a denial of justice which in turn constitutes a breach of the FET standard.[297] A violation of the investor's right to due process is one of the least contested and at the same time the most popular ground for proving a violation of the standard.[298] While many due process claims concern administrative proceedings, a large part of the claims are made in connection with another element of the FET standard, including transparency and bad faith.[299]

In this chapter, due process has been divided into two subcategories, procedural and substantial denial of justice. Procedural denial of justice refers to situations where procedural guarantees of a legal procedure (administrative or judicial) have been disregarded. Substantial denial of justice concerns situations where the application of rules and regulations has been arbitrary or discriminatory. These categories are not absolute, and there exists some overlap between them.

6.1.1 Procedural Denial of Justice

This subchapter deals with the procedural dimension of due process. It ensures that the actor who is the subject of the state's coercive powers should receive a notice of the intended actions by the state as well as a possibility to contest the actions in front of an impartial tribunal.[300] Another way of defining it could be by stating that procedural due process guarantees access to justice, a guarantee on a fair procedure as well as a general prohibition against denial of justice.[301] Dolzer and Schreuer (2012) argue that these guarantees relate to three stages in the process, namely the right to bring a claim, the right to be fairly treated during the process as well as the right to an appropriate decision and the enforcement of it.[302]

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[297] As such, denial of justice can be considered "the dark side" of due process. While it can be argued whether the they complement each other perfectly, this is the assumption taken in this thesis in the interest of length.

[298] Diehl (2012), page 437.

[299] *Id*.

[300] Vandevelde (2010), page 49-50 and Dolzer & Schreuer (2012), page 154.

[301] Vandevelde (2010), page 50.

[302] Dolzer & Schreuer (2012), page 179.

To gain a better understanding of due process, understanding what a *procedural* denial of justice entails is necessary. In *Azinian v. Mexico,* the Tribunal provided a comprehensive definition of denial of justice.[303] The Tribunal argued that:

> *"A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."*[304]

The following sections will go through two examples where an investor has alleged a breach of its right to due process. Despite this, there have been many cases where Tribunals have assessed the question and relationship between due process and the FET standard.[305]

6.1.1.1 Mondev v. the United States

The first case is *Mondev v. the United States*. The dispute arose between a Canadian real-estate developing company, Mondev International Ltd., and its joint venture partner Sefrius Corporation, and the city of Boston ("the City"), all of whom had entered a tripartite agreement concerning the construction of a department store in the city. The development of the area consisted of two phases. In accordance with the agreement, phase I included the construction of a shopping mall, a hotel and a parking garage.[306] Phase II of the project included the construction of additional retail spaces, a department store and an office building which were to be located on parcels of land that were adjacent to those used in phase I.[307]

The tripartite agreement included the exclusive option for the investor to buy the property, the "Hayward Parcel," where the constructions in phase II were to be built. The conditions

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[303] Azinian v. Mexico, Award, (1 November 1999)

[304] *Ibid*. para. 102-103. Earlier sources define it as: "*Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."* Bourchard (1929), page 173.

[305] Among others: Metalclad v. Mexico, Award, (30 August 2000), para. 91, Thunderbird v. Mexico, Award, (26 January 2006), para. 197-201, Waste Management v. Mexico, Award, (30 April 2004), para. 130-132 and Grand River Enterprises v US, Award, (12 January 2011) para. 222-36.

[306] Mondev v. United States, Award, (11 October 2002), para. 37.

[307] *Id*.

for the options were that: a) the City had decided to demolish the existing construction on the property in question and b) the investor notified the City within a three year period of its intention to buy the property.[308] When the City decided to demolish the construction on the Hayward Parcel, the investor accordingly notified the City of its intention to buy the property. However, the City took to "obstructionist tactics" to delay the selling of the parcel. According to the investor, these tactics were largely orchestrated by the Mayor of Boston as he believed that the price that had been agreed to in the Tripartite Agreement did not reflect the market price at the time.[309]

As the City had essentially refused to sell the parcel to it, the investor was forced to sell its interest in the project to another company, Campeau Corp. To the detriment of the investor, the City further refused to accept the transfer the right of ownership to Campeau Corp., which eventually resulted in that the investor was forced to enter into a less valuable lease agreement with the Corporation.[310]

Consequently, the investor started proceedings against the City in the courts of Massachusetts. The jury in the case decided in favor of the investor, although the verdict was not enforced as the Court upheld that the Respondent partially enjoyed statutory immunity and partially that the Claimant had not been able to prove that it was willing and able to perform its contractual obligations.[311]

In the dispute, the Claimant argued that the US had breached the FET standard by both a procedural and a substantive denial of justice.[312] The Claimant specifically focused on the judicial proceedings following the breach of the tripartite agreement. The Claimant pointed out that the appeals court reversed the verdict by the jury by "*substituting its own version and interpretation of the facts*" without hearing the facts or witnesses presented in the earlier proceedings.[313] This was despite the fact that a jury had explicitly found that the investor had fulfilled its contractual obligations while the City had not. More specifically, the Claimant argued that the appeals court contradicted its own settled precedent practice

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[308] *Ibid*. Tripartite agreement, section 6.02.

[309] *Ibid*. para. 37.

[310] Dumberry (2013), page 238.

[311] Mondev v. United States, Award, (11 October 2002), para. 37, see also: Dumberry (2013), page 238.

[312] As mentioned in the introduction, this chapter focuses on the arguments pertaining to the procedural denial of justice.

[313] Mondev v. United States, Notice of Arbitration, (1 September 1998), para. 141.

by deciding not to return the case to a jury but instead decided by its review that the investor was not relieved of its contractual obligations in the agreement despite the City's clear breach of the Tripartite agreement.[314]

In addition to this, the Claimant argued that the appeals court had created radically new rules of contract law, which it then applied on the investor's claim retroactively, despite the fact that the City had not even argued on the application or existence of such rules.[315]

The final claim made by the Claimant was that the courts had granted the City's sovereign immunity claim despite the fact that the City had been engaged in a commercial activity (which excludes immunity). The jury had already found the City guilty of violating the tripartite agreement by awarding the investor $6.4 million because of the City's *intentional interference* with the sales agreement with Campeau Corp. However, the Courts denied the investor's recovery rights based on the sovereign immunity claims by the City, which precluded its responsibility.[316] The Claimant argued that sovereign immunity could be waived at any time; "*either expressly or by conduct*"[317] The Claimant argued that the City had waived its immunity on two grounds. First, that it had vigorously participated in the proceedings and only after the close of the evidence trial had the City submitted its immunity claim. Second, that according to a well-established principle of international law, a sovereign waives its immunity when it engages in commercial activity.[318] The decision by the appeals court to uphold the City's immunity claim therefore constituted a procedural denial of justice as it a) allowed the City to escape its liability of the bad faith actions it had taken against the investor in the capacity of a commercial contracting party and b) it made it impossible for the investor to rely on any possible remedies against the City.[319]

The Tribunal first assessed the nature of a denial of justice claim. It reiterated the findings in *Azinian v Mexico* and stressed the fact that the Tribunal should not be regarded as a

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[314] *Id*.

[315] *Id*.

[316] *Ibid*. para. 143

[317] Mondev v. United States, Notice of Arbitration, (1 September 1998), para. 143. The Claimant relied mostly on the works of Ian Brownlie, who had stated that: "*[N]o fundamental principle prohibits the exercise of jurisdiction, and [sovereign] immunity can be waived by the state concerned either expressly or by conduct. Waiver may occur, inter alia, […]by actual submission to the proceedings in the local cour*t." Brownlie (1998), page 343.

[318] *Ibid*. para. 147.

[319] *Id*.

fourth instance. Here, the Tribunal found it useful to turn to the *Elsi* case where the ICJ had applied a criterion that was equally useful in the context of determining a denial of justice. The ICJ had rejected the claims made by the US in stating that:

> *"Arbitrariness is not so much something opposed to* ***a*** *rule of law, as something opposed to* ***the*** *rule of law … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*"[Emphasis added][320]

Here, the Tribunal pointed out that its duty was therefore not to determine whether the acts of the appeals court had been surprising, rather the test was whether:

> *"[T]he shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection*"[321]

It is worth noting the various components in the standard of review, which the Tribunal applied in this case. It contains the usual component of the Neer standard with regards to the community of an impartial judiciary and the analysis of its reaction to the alleged infringements.[322] Furthermore, the Tribunal included the reasoning by the ICJ in the *Elsi* case, in an attempt to elaborate on the required seriousness, or the "egregiousness", of the unlawful acts. Like in *Elsi*, it is not single acts of unlawfulness that elicit a violation of the international standard, rather it is serious acts that go against the rule of law itself. [323] As pointed out by the Tribunal in *Loewen*, there are no "perfect trials" and to that extent, Courts and Tribunals should apply doctrines of harmless error, which allows for a certain degree of error by local courts.[324] This is even more relevant with regards to IIA. As such,

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[320] *Elsi* judgment, I.C.J. Reports 1989, page 76, para. 128

[321] Mondev v. United States, Award, (11 October 2002), para. 127.

[322] In comparison to what the Commission stated in the Neer case: "*The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency"* United States (L.F. Neer) v. United Mexican States (1926), Page 61.

[323] As Edvin Bourchard already pointed out in the 1920s: "*An error of a national court which does not produce manifest injustice is not a denial of justice."* Bourchard (1929), page 173.

[324] Loewen v. United States, Award (26 June 2003), para. 120.

the Tribunal wanted to avoid functioning as fourth instance by expressly pointing out the dichotomy between *single acts of unlawfulness* and *acts that go against the rule of law itself* as well as between *fourth instance violations* and *violations of the international standard.*

Having established its role in the dispute, the Tribunal moved on to assess the substantial claims of the investor. It had essentially provided four grounds on which there had been an alleged breach of the element of due process. This chapter will only focus on the most relevant grounds, namely the "new law argument," retroactivity and the issue of immunity.

First, the Tribunal did not find the Claimants argument about the new law convincing. It found that the principle applied by the Court, originally formulated in *Leigh v. Rule*, was a principle that existed in many other systems of contract law and that even if the principle had constituted a new principle, the decision would have fallen within the limits of common law adjudication.[325] Here, the court found that there was nothing in the conduct of the appeals court that would have "*shocked or surprised even a delicate judicial sensibility*."[326]

With regards to the second issue, the main problem was whether a change in judicial practice can have a *retrospective* effect, or whether it is strictly limited to a *prospective* effect. The Tribunal was of the opinion that the principle applied in the case fell within the ambit of lawmaking exercised by courts.[327] In addition to this, the Tribunal referred ECtHR cases where the Court in question had dealt with the retrospective application of criminal law in light of Article 7 of the European Convention of Human Rights.[328] In those

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[325] Mondev v. United States, Award, (11 October 2002), para. 133. The appeals court had supported its findings on the principle formulated in Leigh v. Rule, which stated that: *a material failure by a plaintiff to put the defendant in breach "bars recovery… unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform".* Leigh v. Rule, 331 Mass. 664, 668 (1954)

[326] Mondev v. United States, Award, (11 October 2002), para. 133.

[327] *Ibid*. para. 137.

[328] The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome 4 November 1950, in force 3 September 1953. See for example: Kokkinakis v Greece, where the Court stated that: *The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable*. Kokkinakis v Greece (25 May 1993), para. 52

cases, the Court did not exclude the possibility that a retrospective application of criminal law could be used in the accused disadvantage.[329] However, this was still limited to situations where the rule existed, and the "*elucidation of doubtful points*" and "*adaptation to changing circumstances*" took place within the accepted boundaries of judicial lawmaking in a legal tradition.[330] Based on this, the Tribunal concluded that it was indeed possible for local courts to apply new decisional law retrospectively.[331]

Finally, the Tribunal turned to the immunity claims. As mentioned above, the Supreme Judicial Court declined to enforce the jury's verdict against the city because Massachusetts Tort Claims Act granted immunity to the City, something the investor regarded as a violation of Article 1105. The Tribunal pointed out that it is a well-established principle within international law that states and their agencies can claim immunity despite that conduct being civilly wrongful.[332] The Tribunal supported its claims on ECtHR case law, where it has been established that immunity does not constitute a denial of access to court in violation of Article 6(1).[333] However, the general doctrine of foreign state immunity, which the US government argued to be analogous to the current situation, refers to the host

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[329] S.W. v. United Kingdom, decision (22 November 1995), paras. 34-36; C.R. v. United Kingdom, decision (22 November 1995), paras. 32-34; C.R. & Krenz v. Germany, decision (22 March 2001), para. 50. This is also the case in civil cases, see for example: Zielinski and Pradal & Gonzalez and Others v. France, Judgment (28 October 1999), para. 57, Carbonara and Ventura v. Italy, Judgment (30 May 2000), para. 69, Agoudimos and Cefallonian Sky Shipping Co. v. Greece, Judgment (28 June, 2001), para. 30 and The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society V. The United Kingdom, Judgment, (23 October 1997) para. 112.

[330] S.W. v. United Kingdom, decision (22 November 1995), paras. 36.

[331] Mondev v. United States, Award, (11 October 2002), para. 137. The Tribunal further noted, that this was also common practice for local courts to change their decisional practice. See for example; Tucker v. Badoian, 376 Mass. 907, page 918-919 (1978), where the court pointed out that "*Ordinarily a change of decisional law falls into place and is applied to past as well as to subsequent transactions or occurrences*." This is thus the *default* principle, and there needs to exist special circumstances in order for the new decisional law to only be applicable prospectively.(See also: However, retrospective effects can be limited if certain circumstances prevail. These include: 1) whether a new principle has been established whose resolution was not clearly foreshadowed, (2) whether retroactive application will further the rule, and (3) whether inequitable results, or injustice or hardships, will be avoided by a holding of non-retroactivity. McIntyre v. Associates Fin. Servs. Co. of Mass., 367 Mass. 708 , 712 (1975), Chevron Oil Co. v. Huson, 404 U. S. 97, 106-107 (1971), Schrottman v. Barnicle, 386 Mass. 627 , 631-632 (1982) and Payton v. Abbott Labs, 386 Mass. 540 , 565 n.12 (1982).

[332] Mondev v. United States, Award, (11 October 2002), para. 141.

[333] See for example Al-Adsani v. the United Kingdom , where the Court stated that "*Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity*." Al-Adsani v. the United Kingdom, App No 37112/97 (ECtHR, 21 November 2001), para. 56. See also: McElhinney v. Ireland, App no 31253/96 (ECtHR, 21 November 2001) para. 36 and Fogarty v. The United Kingdom, App no 37112/97 (ECtHR, 21 November 2001) 36

states immunity from being subjected to claims in *the jurisdiction of another state*. Here, the Tribunal pointed out that there is a closer analogy to situations where the issue concerns statutory immunities of state agencies in front of domestic courts.[334] Again, the Tribunal looked to the case law of the ECtHR, in which the issue had been discussed. Primarily, the Court has condemned the unlimited possibility of a state to remove jurisdiction from municipal courts from hearing a whole range of civil claims, although it pointed out that Article 6(1) did not provide a claimant with a substantive civil right.[335]

The Tribunal pointed out that the decisions by the ECtHR were not concerned with investment protection. Therefore they can, at most, only give guidance by *'analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security*".'[336] Despite this, the Tribunal did observe that the existence of immunity for the City, in this case, should be classified as a matter of substance, thus rendering the arguments on access to court by the ECtHR without effect.[337]

In its conclusion, the Tribunal recognized that a violation of the FET standard is dependent on the tortious act to which the state is granted immunity.[338] The Tribunal assessed the motivations behind the decision of the judges to uphold the City's immunity and came to a conclusion that:

> *"[…][R]easons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference."*[339]

The reason why the Tribunal did not find a violation of Article 1105 was because it was not convinced the breach of contractual obligations was serious enough to violate the international standard minimum standard. Immunity in itself could not constitute a legitimate grounds for a violation. This is because the host states immunity does not extend to violations of customary international law, including the FET standard, and therefore it

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[334] Mondev v. United States, Award, (11 October 2002), para. 143.

[335] Fayed v The United Kingdom App no 17101/90 (ECtHR, 21 September 1994), para. 65. See also: Fogarty v. The United Kingdom, App no 37112/97 (ECtHR, 21 November 2001), para. 25.

[336] Mondev v. United States, Award, (11 October 2002), para. 144.

[337] *Id*.

[338] *Ibid*. para. 152.

[339] *Ibid*. para. 153.

does not restrict the investor's possibility to seek a remedy under IIA. Finally, the Tribunal concluded that since the application of the Massachusetts law did not involve arbitrary or discriminatory actions, it was "*far from clear*" in which way the statutory immunity in itself could have been unfair and inequitable.[340]

As it is evident from the case, the high threshold of the FET standard permeates the element of due process. Considering that the Tribunal would have had to overrule state immunity in the current case, something sacrosanct which many Tribunals go great lengths to avoid challenging, it could be argued that the acts by the City be no way egregious enough to outweigh the (political) consequences from waiving state immunity.

6.1.1.2 Loewen v. the United States.

The case concerned a commercial dispute between a Canadian funeral service corporation, Loewen group, and Jeremiah O'Keefe who were competitors in the funeral home business in Mississippi. The disputing parties had entered into some commercial agreements on which O'Keefe later based his anti-trust and breach of contract claims against Loewen. The actual amount suffered by O'Keefe amounted to about 4million dollars. Together with his counsel, O'Keefe managed to establish a case based on prejudicial statements that referred to race, nationality and social class.[341] Their strategy, which manifestly succeeded, was to paint a picture of O'Keefe as being a poor local businessman, a true patriot that had served in the Second World War. Now, he was being bullied by a big foreign corporation that did not care for the poor, African American people nor the United States in general.[342] In its

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[340] *Ibid*. para. 156.

[341] The Counsel of O'Keefe made several prejudicial claims about Loewen in an attempt to alienate the mostly African American jury. One example is how the counsel used class as an effective tool: "*He doesn't have the money that they have nor the power, but he has heart and character, and he refused to let them shoot him down." "You know your job as jurors gives you a lot of power … You have the power to bring major corporations to their knees when they are wrong. You can see wrong, make it right. Suffering and stop it." "Ray comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get to a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him. Now, they've got to be stopped … Do it, stop them so in years to come anybody should mention your service for some 50 odd days on this trial, you can say 'Yes, I was there', and you can talk proud about it." "1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again. And you're not just helping the people of Mississippi but you're helping poor people, grieving families everywhere. I urge you to put your foot down. Don't let them get away with it. Thank you, and may God bless you all*."

[342] Loewen v. United States, Award (26 June 2003), para. 70. See also: expert opinion by Sir Robert Jennings, who argued that "*The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice, particularly against "Canadians" (that term being used as a self-explanatory pejorative one), was the weapon by which counsel for the*

verdict, the jury awarded the Plaintiff, O'Keefe, $500,000,000 in damages. The investor tried to appeal the verdict, but the district judge refused to decrease the bond requirements which under Mississippi law require that a bond of 125% of the damages awarded has to be placed for the execution of the judgment to be postponed.[343] This eventually forced the investor to sign a settlement deal with O'Keefe amounting to $175 million.[344]

In the current case, the investor argued that the fact that the trial court had allowed the Claimant to base his case on nationality, racial and class-related arguments and comments constituted a direct violation of Article 1105 of NAFTA. The investor also argued that the excessive verdict constituted a violation of the same article. Finally, the investor argued that the bond requirements were arbitrary and in violation of Article 1105.[345]

The Government, on the other hand, claimed that the investor had not exhausted all local remedies and that there, therefore, did not exist any justifiable grounds for the investor's denial of justice claims.[346] In addition to this, the Government contended that the proceedings had in fact been conducted in a fair manner and that it was the shortcomings of the counsel of Loewen who was to blame for not objecting to the alleged prejudicial claims made by opposing counsel.[347] Finally, the Government argued that the fact the investor had settled for a fifth of the initial verdict cannot be seen as so "grossly excessive" as to breach the international minimum standard.[348]

While the Tribunal rejected the claim on jurisdictional grounds, there are nonetheless many relevant arguments that were emphasized in the case. The Tribunals general sentiment towards the trial was that of, in lack of a more fitting word, disgust.

> *"[…][W]e have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice*

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plaintiffs was able to bring about the bizarre verdict of the jury." Opinion of Sir Robert Jennings (on the general nature of claim), (26 October 1998), para. 9.

[343] The law does, however, allow for the bond to be reduced if there is "good cause".

[344] According to the investor, they were forced to sign the settlement agreement under extreme duress due to the fact that the bond requirement ($625 million) effectively foreclosed Loewen's appeal rights. Loewen v. United States, Claimant's Notice of Claim, (30 October 1998), para. 6.

[345] The investor also argued for other violations that are not relevant in this thesis.

[346] US Counter-Memorial on the Merits, (30 March 2001), page 4.

[347] *Ibid*. page 3.

[348] *Ibid*. page 5.

amounting to a manifest injustice as that expression is understood in international law."[349]

The Tribunal was unanimous in its opinion that the Trial judge had grossly failed to afford due process to Loewen when the judge did not prevent the tactics used by the counsel of O'Keefe.[350] Therefore, it defied common sense to argue, as the Government did, that Loewen had waived its objections to due process. [351] However, these factors did not by themselves constitute a denial of justice in breach of Article 1105, as there existed some procedural impediments which will be discussed later.

The Tribunal also assessed the question regarding the compensation and punitive damages awarded to O'Keefe. It concluded that the award appeared to be "grossly disproportionate" to the actual damage that O'Keefe had suffered, which only included damages amounting to approximately $4 million.[352]

Having established that the compensation was grossly disproportionate, the Tribunal turned to the question of whether the whole trial constituted a breach of the minimum standard contained in Article 1105. First, the Tribunal pointed out that the host state is under an obligation in international law to provide an alien with a fair trial, which requires that the alien not be subjected to discrimination or be the object of sectional or local prejudice.[353] Second, it formulated the threshold for which there is a due process violation of Article 1105, namely that the dismal proceedings have to constitute a:

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[349] Loewen v. United States, Award (26 June 2003), para. 54

[350] *Ibid*. para. 87

[351] *Ibid*. para. 87. The Tribunal recognized that it might not have been so straightforward as to object to the tactics used by O'Keefe's counsel, since the Loewen might had run the risk of looking like they were trying to suppress the facts. In other words, the Tribunal pointed out the delicate nature of pleading in proceedings with a jury, which includes having to be tactical even when opposing counsel is using "dirty tactics".

[352] Loewen v. United States, Award (26 June 2003), para. 87.

[353] *Ibid*. para. 123. The Tribunal further mentioned several cases in which a new trial had been ordered in circumstances where the opposing counsel had used tactics based on prejudice, *without the defendant objecting to these arguments.* See for example: *Walt Disney World Co. v Blalock*, 640 So.2d 1156 (1994) where the Court stated that: "*Improper comments made by counsel for both plaintiffs and defendants, especially in trials involving personal injuries, are arising as points on appeal with alarming and increasing frequency. We agree with that opinion that "it is no longer — if it ever was — acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their choosing...We agree with the Third District that appellate courts should not supinely ratify the results of such trials, even absent objection.*[Emphasis added]*"*

> *"Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms."*[354]

The Tribunal concluded that the whole trial and the subsequent verdict were improper and discernable and as a result was not compatible with the FET standard.[355] As it is clear from it arguments, the Tribunal relied on a general test of "offending judicial propriety" when assessing the actions. It is unclear how this test functions in relation to the broader public mentioned in the Neer case. Nevertheless, it is reasonable to think that the "egregiousness" would equally have been reached in that the conduct in the court proceedings clearly shocks and outrages any impartial person.

Despite this, there remained the procedural impediment, namely the question of exhausting local remedies. In general, local remedies should be effective, adequate and available for the obligation to exhaust them to be in force.[356] The Tribunal clarified, that availability means that it should be reasonably available for the investor, which includes financial circumstances.[357] According to the Tribunal, the investor had failed to show why entering into a settlement agreement was preferable than pursuing other options, mainly the possibility to directly appeal to the Supreme Court based on the due process claims.[358] Therefore, the Tribunal concluded that there had been no violation of Article 1105.

The Tribunal also added some final words in its conclusion. It recognized that there had been unfairness towards Loewen and that this was indeed a case where the ideals of NAFTA could have "been given some teeth."[359] While the Tribunal admitted that the "human reaction" and the natural instinct to step in and rectify the miscarriage of justice had been present in the minds of the arbitrators, it was nonetheless more important to preserve the viability of NAFTA. While the Tribunal agreed that a failure of providing

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[354] *Ibid*. para. 132. The Tribunal supported its formulation on the reasoning made in the Mondev case, where the tribunal in question stated that: "*the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'"*

[355] *Ibid*. para. 137.

[356] Loewen v. United States, Award (26 June 2003), para. 168.

[357] *Ibid*. para. 169

[358] *Ibid*. para. 215.

[359] *Ibid*. para. 241.

adequate means of remedy falls within the ambit of the international standard, this is only the case when the remedy has de facto been the last resort.[360] In the end, the Tribunal was not ready to compromise the interests and principles of the international investment community by transforming itself into an appellate instance.

The procedural impediments were not that obvious, and the Tribunal could arguably just as well have granted the investors claims. Some authors argue that the fact that the Tribunal was so reluctant to find a violation was due to the strong reaction that a condemnatory award might have had in the US Congress.[361] To which degree this is true is arguable. However, it is clear from the Tribunals own statements that they have been mindful of the "larger picture" that the award would affect. The Tribunal emphasized the interest of the international investment community, and as such, it is not far-fetched to conclude that the arbitrators are mindful of the broader policy implications that the award might have.[362] This case serves as a good example of how Tribunals are affected by the legal culture which seemingly dictates invisible boundaries. This is, of course, one of the adverse effects of the culture, as it arguably limits the Tribunal more than what the law does.

Nonetheless, the case still exemplifies a clear situation, where the egregiousness of the acts undoubtedly elicit such a reaction which "outrages or shocks" a reasonable an impartial person. The awards serve as an indicator of the circumstances which have to prevail for the international standard to be breached. It is granted that this case was extraordinary. However, it still legitimizes the fears that many investors have when they face proceedings in local courts. While they are few and far apart, the FET standard functions as an absolute bottom line that protects against local court trials that have entirely derailed.

6.1.2 Substantial Denial of Justice

As mentioned above, the concept of denial of justice is composed of two dimensions, a procedural and a substantial. While the procedural dimension puts the requirements on the individual process, the substantial dimension is a reference to the law itself. In a state where the rule of law prevails, the law binds the judicial actors and to that end, they are ideally constrained from using power arbitrarily. The substantial includes protections

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[360] *Ibid*. para. 242.

[361] Dumberry (2013), page 251.

[362] One risk being that there is a strong backlash against the whole ISDS mechanism as the sentiment in the State is that their judicial independence is being challenged by international investment tribunals.

against situations where laws are being applied at the "whims of the rulers."[363] This chapter is a brief analysis of the concept of arbitrariness and discrimination, the two main components of substantial denial of justice.

From a broader perspective, this subchapter concerns the substantial guarantees provided by due process. As mentioned in the beginning, due process constitutes a free-standing element of the FET standard.[364] In other words, if a host state discriminates or acts arbitrarily towards the investor in a way that amounts to a substantial denial of justice, there is a clear violation of the FET standard. There are arguments against this interpretation as well.[365] Some authors question why treaty drafters would use different terms if they all mean the same thing.[366] It could be argued that there is significant overlap between the different terms, which makes the differences non-existent in reality.[367] In any event, since most Tribunals have interpreted arbitrariness and discriminatory treatment as being an element of the FET standard, there is not much to gain in concentrating on the [semantic] differences between them.

6.1.2.1 Arbitrariness

The ICJ has provided definitions on arbitrariness. In the *Asylum* case, the Court argued that actions are arbitrary when the action substitutes the rule of law.[368] In the *Elsi* case, the Court developed this argument by stating that an act is arbitrary if it opposes to the rule of law and if this opposition is a willful disregard of due process that shocks or at least surprises a sense of judicial propriety.[369]

Arbitrary conduct can thus be regarded as a violation of the standard requirement to act in accordance with domestic law.[370] However, the ICJ has underlined that from the mere fact that an act of a public authority is unlawful under municipal law, does not automatically

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[363] Vandevelde (2010), page 50.

[364] Schill (2006), page 19 & Dumberry (2013), page 205.

[365] See further Dolzer & Schreuer (2011), pages 190-197.

[366] Dolzer & Schreuer (2011), page 194.

[367] *Id*.

[368] Asylum Case, (Colombia v. Peru), Judgement, I.C.J. Rep. (1950), page 284

[369] *Elsi* judgment, I.C.J. Reports 1989, page 76, para 128

[370] Schill (2006), page 20.

follow that this act is unlawful also under international law.[371] Thus, the fact that an act has been unlawful under municipal law does not in itself prove arbitrariness but can be used as an argument in support of the act also being arbitrary.[372] This has further been elaborated in IIA by the *Gami v. Mexico* case, where the Tribunal stated that:

> *"[A] government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105*"[373]

The case concerned an American investor that was involved in processing sugar in Mexico. In 2001, the Mexican state expropriated five sugar mills that were the property of the investor through a new legislation, the "sugar decree." The investor argued that the expropriations were flagrant and arbitrary and that the Mexican government had "*arbitrarily and discriminatorily implemented certain aspects of the law and capriciously refused to implement and enforce others*."[374] In the case, the Tribunal found that maladministration by the host state constitutes a violation of Article 1105 only if it amounted to an "outright and unjustified repudiation" of the relevant regulations.[375] Therefore, if the host state fails to abide by its laws and regulations, this does not amount to an arbitrary act that is in violation of the FET standard if it lacks an "outright and unjustified repudiation."[376]

The common denominator for arbitrary acts seems to include situations where there is a "manifest lack of reasons."[377] Another way of determining whether an act has been arbitrary is if there does not exist a relationship between the means and the end of the

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[371] *Elsi* judgment, I.C.J. Reports 1989, page 76, para. 124.

[372] *Id*.

[373] Gami v. Mexico, Award, (15 November 2004), para. 91. This stance is also supported by other Tribunals, such as: ADF v. United States, Award, (9 January 2003), para. 190, Glamis v. United States, Award, (8 June 2009), para. 626 and Cargill, Inc. v. Mexico, Award, (18 September 2009), para. 303. In ADF, the Tribunal stated that: "*something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)"*

[374] Gami v. Mexico, Award, (15 November 2004), para. 88 and 98.

[375] *Ibid.* 103. In this context, *maladministration* refers to a situation where the host State misapplied their own laws.

[376] Dumberry (2013), page 206.

[377] Glamis Gold v. United States, Award, (8 June 2009), paras. 803.

requirement.[378] In *Cargill*, the Tribunal found that Mexico had acted arbitrarily since there existed a divergence between the actual aim of the legislation and the means through which it was actualized.[379] The Tribunal found it to be manifestly unjust to institute a permit requirement for foreign producers in the single attempt to persuade the United States to alter its trade practices.[380] In addition to this, the Tribunal pointed out that the permit requirements issued by the Mexican state were based on a "complete lack of objective criteria."[381]

Another aspect of arbitrariness is when there exists a "deliberate conspiracy" against the investor. In the *Waste Management* case, this was a specific issue of the case. The case concerned a concession contract between the investor and a Mexican municipality. After the contract had entered into force, several of the exclusive rights granted to the investor under the contract were violated. The Claimant argued that the Mexican agencies conspired to frustrate the concession, which constituted an arbitrary act that was in violation of Article 1105. The Tribunal agreed that if there existed such a deliberate conspiracy, which it defined as a "*conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement*," then there would be no doubt that this constituted a violation of the FET standard under Article 1105.[382] However, as there existed sufficient reasons to explain the collapse of the concessions agreement, the Tribunal found that it was unnecessary to resort to conspiracy theories that were unsupported by solid evidence.[383]

All in all, in those Tribunals where the question of arbitrariness has been assessed, the threshold has consistently been set high.[384] In its essence, all Tribunals require that the arbitrary act committed by the host state reached the original standard set out in the *Elsi* case, namely that the arbitrariness '*shocks, or at least surprises, a sense of juridical propriety*.'[385] It is debatable whether "manifest arbitrariness" is required to reach the

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[378] Cargill, Inc. v. Mexico, Award, (18 September 2009), para. 299.

[379] *Ibid.* para. 299.

[380] *Id.*

[381] *Ibid.*para.301

[382] Waste Management v. Mexico, Award, (30 April 2004), para. 138.

[383] *Ibid.*para. 139.

[384] Dumberry (2013), 203-204

[385] *Id.*

customary international standard, since many of the abovementioned cases include actions which seem arbitrary, just not *that* arbitrary. Whether or not there is a need for an adjective qualifier for the arbitrariness to constitute a violation of the FET standard is of little importance. What is important to note, however, is that the act needs to be arbitrary on an *international level.*

6.1.2.2 Discrimination

The prohibition of discrimination is usually well covered in an investment treaty, which is also the case with NAFTA. NAFTA, including most if not all BITs, contain clauses on NT MFN. Without further elaborating the content of these clauses, their primary function is to outlaw all discrimination that is based on nationality. For example, by the NT clause, the host state is obliged to provide the same treatment to a foreign investor as it provides to its nationals. Arguably, the FET standard also contains a prohibition against discrimination, which some authors regard as one of the constitutive elements of the FET standard alongside with arbitrariness.[386] However, discrimination under the FET standard is not based on nationality as the abovementioned standards already cover it. Instead, this kind of discrimination includes other more specific types of discrimination. Generally speaking, these grounds include those types of discrimination, which are included in Article 2 of the Universal Declaration of Human Rights (UDHR), such as race, religion and political opinion.[387]

The additional requirement under the FET standard is that the difference in treatment that the investor is alleging has to be arbitrary, unreasonable and not based on a rational foundation.[388] This means that the FET standard does not prohibit discrimination by itself,

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[386] Vascianne (2000), page 33. Vascianne states that "*if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated*"

[387] Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217 A(III). Article 2: *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty*. Article 7: *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

[388] Dumberry (2013), page 210. See also Vandevelde (2010), page 63. Vandevelde states that "*The fair and equitable treatment standard, however, appears to prohibit only unreasonable discrimination*" [Emphasis added].

but that only such scenarios where the discrimination is *unreasonable,* does the host state violate the FET standard.[389] Justified discrimination should therefore have a legitimate, nondiscriminatory purpose.[390] While this can seem contradictory on first reading, it is important to note that there is a difference in discriminating for discrimination's sake, and discriminating against some other, legitimate purpose. This will become clearer by analyzing how it has been applied in case law.

In *Methanex v United States,* the investor, a Canadian company, brought a claim against the US because the state of California had adopted measures that allegedly had the intent of discriminating and harming Methanex and other foreign methanol producers. The measures included an executive order and regulations that banned the use of MTBE reformulated gasoline, in which a key ingredient is methanol. Here, the US contended that the FET standard constituted an *absolute* minimum standard of treatment, and discrimination under this standard is not dependent on how the host state treats its nationals.[391]

The Tribunal agreed with the arguments presented by the US in that the FET standard does not by its "*plain and natural meaning*" preclude governmental differentiations between nationals and aliens.[392] General international law does not provide a prohibition against treating aliens different than nationals. However, this obligation can be established through treaties.[393] Since the FET standard constitutes the minimum standard provided by customary international law, any discrimination based on nationality that is not based on such *unreasonable* grounds mentioned above, should in theory not constitute a violation of the FET standard. However, the Tribunal was not very specific in what kind of discrimination is in fact included in the FET standard. The Tribunal simply stated, "*some differentiations are discriminatory*."[394] On these grounds, the Tribunal found that the ban

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[389] Vandevelde (2010), page 63.

[390] *Ibid.* page 66.

[391] US Amended Statement of Defense, (5 December 2003), para. 358. US further argued that the prohibition of discrimination contained in the FET standard is strictly limited to customary international law, which only contains a rule of non-discrimination with regards to denial of justice and protection against violence. Economic discrimination is not included in in the rule of non-discrimination under customary international law. US Statement of Defense (2003), para. 373-377.

[392] Methanex v. United States, Award, (3 August 2005), Part IV, Ch. C, para. 14.

[393] Dolzer & Schreuer (2011), page 196.

[394] Methanex v. United States, Award, (3 August 2005), Part IV, Ch. C, para. 26.

on MTBE by the state of California had not been discriminatory or in any way exposed the investor to "*sectional or racial prejudice*."[395]

In conclusion, there seems to be a definitive stance that discrimination under the FET standard does not include nationality based differentiations unless the treatment is coupled with a violation of some other element of the FET standard.[396] While it is somewhat unclear whether discrimination constitutes a stand-alone element of the FET standard, there is compelling evidence that points to that this would be the case if the discrimination were severe enough. [397] This would almost definitely be the case if the investor were the target of sectional and racial prejudice. However, these situations seem relatively improbable in practice. Therefore, a simple discrimination, which lacks severity, is excluded from being a violation of the FET standard.

6.2 Good Faith

Good faith (*bona fide*) is a general principle of law. General principles of law, as mentioned in a previous chapter, are a source of international law.[398] In the *Nuclear Tests Case* from 1974, the ICJ concluded that the principle of good faith constituted one of the "*basic principles governing the creation and performance of legal obligations, whatever their source*."[399] This does not mean that the principle of good faith is an autonomous stand-alone obligation.[400] This was pointed out by the ICJ when it stated that the *"[principle of good faith] is not in itself a source of obligation where none would otherwise exist*."[401]

The general principle of *pacta sunt servanda* contained in Article 26 of the VCLT, obligates the parties to abide by the treaty in good faith. Also, when interpreting a treaty,

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[395] *Id.* See also Waste Management, Inc. v. Mexico, Award, (30 April 2004), para. 98 where the Tribunal stated that "*the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is […]discriminatory and exposes the claimant to sectional or racial prejudice*"

[396] For example, discriminatory treatment based on the investor's nationality which limits the investors access to justice.

[397] Meaning that a simple violation of the element means that the FET standard has been violated.

[398] ICJ Statute, Article 38(1). In a FET context, see Dolzer & Schreuer (2012), page 18.

[399] Nuclear Tests (Australia v. France), Judgement, ICJ Rep. (1974), at 268, para. 46.

[400] Dumberry (2013), page 223.

[401] Concerning Border and Trans border Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, (20 December 1988), ICJ Rep. 1988, para. 94.

the VCLT obligates that it is to be interpreted in good faith.[402] From this follows that there is a default assumption when entering the treaty, the parties did so in good faith. This also explains the rules contained in Article 32 of the VCLT which aims to avoid, among other things, unreasonable results as there is an assumption that none of the parties intended such results when entering their commitments.

The principle can be defined as meaning "*honesty of purpose or sincerity of declaration"* or "*the expectation of such qualities in others*."[403] While it has been pointed out that it is impossible to give an *a priori* definition of the principle as it can only be illustrated, not defined, some authors have nonetheless provided a comprehensive definition of the principle:[404]

> *"The principle of good faith in international law is a fundamental principle from which the rule pacta sunt servanda and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time."*[405]

The principle of good faith is equally as important under international investment law. It has been compared to as having a similar function as the FET standard.[406] However, it stands fairly clear among authors and Tribunals that the principle is *not* a stand-alone element of the FET standard.[407] This is exemplified trough *ADF v. the United States.* As mentioned above, the issue in *ADF* concerned a public procurement and specific rules in the Buy America Act that limited the Canadian steel from being used in the project. The Claimant argued that the US had violated the general principle of good faith and that there as such existed a breach of the FET standard. The Tribunal did not find a violation of the FET standard simply because the US had allegedly acted in contrary to good faith. The Tribunal argued that:

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[402] VCLT Article 31(1).

[403] Diehl (2012), page 348.

[404] *Id.*

[405] O'Connor (1991), page 123.

[406] Dolzer & Schreuer (2012), page 133.

[407] Vandevelde (2010), page 97 and Dumberry (2013), page 223. See also: ADF v. United States, Award, (9 January 2003), para. 191 and Waste Management, Inc. v. Mexico, Award, (30 April 2004), para. 87.

> *"An assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment."*[408]

The Tribunal was therefore of the opinion that a lack of good faith, just as negligence in municipal law, only adds to the motivation of the state which *may* assist the finding of a violation of the FET standard. The critical takeaway is therefore that the principle of good faith is not a stand-alone element of the FET, meaning that it has to be combined with some other element of the FET for there to be a violation of the standard.

In addition to this, it is important to note, that there does not exist a requirement of bad faith (mala fide) in order for there to exist a breach of another element of the FET standard. Bad faith is defined by Dolzer & Schreuer (2012) as an action by a state where legal instruments are used for other purposes that for which they were created.[409] More specifically, acts that are directed at inflicting damage on the investment or attempts to defeat it as a whole is considered to be bad faith.[410] However, a host state can perfectly well stand in breach of the investor's rights to, for example, due process without there existing any evidence of bad faith. This stance has been reaffirmed in several awards.[411]

Finally, something can be said about the similarity between the FET standard and the principle of good faith. While extensive critique has been directed against the FET standard with regards to its vagueness, it can be argued that this aspect of the standard is actually a virtue.[412] Since the standard has a similar function as the principle of good faith has in codes of civil law countries, the FET standard is beneficial as it prescribes protection to investor's rights that otherwise would be impossible to anticipate with more specific rules.[413]

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[408] ADF v. United States, Award, (9 January 2003), para. 191.

[409] Dolzer & Schreuer (2012), page 157-58.

[410] *Ibid.* page 158.

[411] Mondev v. United States, Award, (2 October 2011), para. 116, Glamis v. United States, Award, (8 June 2009), para. 616, Waste Management, Inc. v. Mexico, Award, (30 April 2004), para. 93, Loewen v. United States, Award (26 June 2003), para. 132, Merrill & Ring v. Canada, Award, (31 March 2010), para. 208

[412] Dolzer & Schreuer (2012), page 133.

[413] *Ibid.* page 132-133.

6.3 Legitimate Expectations

It cannot be said that there exists a clear consensus with regards to the requirement of legitimate expectations. Some authors argue that it is merely a creative construction of the arbitrators who try to attribute unfounded meaning to the FET standard.[414] Others argue that it is a vital part of the standard, as it "*requires that the perceptions of the law's subjects and their expectations vis-à-vis government activity be taken into account.*"[415] As the case law will show, Tribunals have established explicit preconditions for the element of legitimate expectations and as such, the latter author is arguably closer to the truth when it comes to describing the element.

The first NAFTA tribunal to examine the issue regarding the investor's legitimate expectations was in the *Metalclad* case.[416] It was not until the ADF case, however, that the term "legitimate expectations" was used.[417] The *Metalclad* case was concerned with the revocation of a permit to run a hazardous landfill in Mexico after it had already been constructed. The primary question in the case was whether an additional municipal permit had also been required prior to the construction of the hazardous landfill.[418] Metalclad had not applied for this permit before initiating the construction, as the investor had relied on the assurances by federal officials, who affirmed that the permit which the investor had already attained was sufficient. The Tribunal concluded that Metalclad "was led to believe" that the existing permit would suffice and that Metalclad was entitled to this belief as it relied on the assurances by federal officials.[419]

While the Tribunal did not base Mexico's violation of the FET standard, the Tribunal did, however, provide essential preconditions for legitimate expectations. These include that the investor's expectation has to be founded on *specific representations*, which in turn have been given by *government officials* and considering the circumstances as a whole, the expectations by the investor have to be *reasonable*.[420]

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[414] See Soranayah (2015), 291-299.

[415] See for example: Schill (2010), page 163.

[416] Metalclad v. Mexico, Award, (30 August 2000), para. 79.

[417] Dumberry (2013), page 139.

[418] Metalclad v. Mexico, Award, (30 August 2000), para. 79.

[419] Metalclad v. Mexico, Award, (30 August 2000), para. 85 & 89.

[420] Dumberry (2013), page 142. See also: Fietta (2006), page 386.

As mentioned above, it was not until the *ADF* Tribunal that the term "legitimate expectations" was used.[421] The case concerned a highway construction project in which ADF was to function as a steel supplier to the construction project. However, the Buy America Act (1982) mandates that construction procurements that are related to rail or road transportation have to use American made steel. As a result, ADF was prohibited from cutting and processing American made steel in Canada. This, according to the investor, constituted a breach of its legitimate expectations specifically because the US Authorities had refused to apply pre-existing case law, which would have exempted the investor from the Buy America provisions.[422] The Tribunal did not accept the investor's argument since it found that misleading representations made by US government officials did not create the expectations that the investor had.[423]

Here, the Tribunal seems to have confirmed the findings in *Metalclad*, when it made references to the "*misleading representations made by authorized officials*."[424] The *ADF* Tribunal thus reaffirmed that for investors' expectations to be legitimate, they need to be based on specific representations made by the competent authorities.

In *Thunderbird v Mexico,* the Tribunal provided a clear definition of legitimate expectation as well as a clarification on the ambit of what expectations should not be regarded as reasonable. The case concerned an American investor that had received an official opinion from the Mexican authorities responsible for the gambling regulation. The investor had relied on the opinion when deciding whether to invest in the intended operations in Mexico. However, as it later came to light, the investor had given false information to the authorities on which the authorities had based its decision on the investor's project. For this reason, the Tribunal did not find that Mexico had breached the investor's legitimate expectations. The investor had been fully aware of the fact that the information given to the authorities was false and that the true nature of the project was illegal under Mexican law. Therefore, the investor could not *reasonably* have relied on the information given by the

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[421] ADF v. United States, Award, (9 January 2003), para. 72 & 189.

[422] *Ibid.* para. 189.

[423] Rather, the investor had relied on relied on legal advice from private US counsel that could not be regarded as binding representations made by the US. ADF v. United States, Award, (9 January 2003), para. 189.

[424] Dumberry (2013), page 142.

authorities.[425] As a consequence, the Tribunal made it clear that *unreasonable* expectations include situations where the investor has not disclosed all the relevant information to the deciding authority.[426]

In addition to this, the Tribunal in *Thunderbird* defined legitimate expectations:

> *"[T]he concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."*[427]

The Tribunal follows the definition used in the *Metalclad* Tribunal while adding a fourth point, namely the requirement that the investor has to suffer damages. Subsequently, in order for there to exist a breach of the element of legitimate expectations, the following requirements need to be met: (a) whether there has been an unequivocal *representation* made by the *state,* (b) the investor has relied on these representations, and this reliance has been *reasonable* and *justifiable*, (c) the state has acted inconsistently to these representations and finally (d) that the investor has suffered a loss due to the inconsistent behavior of the state.[428]

It is necessary to clarify further *what* kind of representations if breached, constitute a violation of an investor's legitimate expectation. The Tribunal in *Glamis Gold* has elaborated on this issue. The case concerned a mining company, *Glamis Gold*, which argued that its legitimate expectations had been breached due to the revocation of the approval for a mining project. In the case, the conditions for allowing mining operations in California were significantly changed by a legal opinion. Here, the Tribunal reiterated the findings in *Thunderbird*, as it argued that the expectations of the investor have to be "reasonable and justifiable," and that objective expectations should induce this.[429]

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[425] Thunderbird v. Mexico, Award, (26 January 2006), para. 163.

[426] Dumberry (2013), page 147.

[427] Thunderbird v. Mexico, Award, (26 January 2006), para. 147.

[428] A similar approach has also been taken by a non-NAFTA tribunal. Oko Pankki Oyj & others v. Estonia, Award, (19 November 2007), para. 248.

[429] Glamis v. United States, Award, (8 June 2009), para. 621.

The important part, in this case, is how the Tribunal reasoned with the relationship between the state's right to regulate and the investor's legitimate expectations. As a general principle, a state cannot violate the investor's legitimate expectations by changing its laws, even if the expectations of the investor are reasonable.[430] This is due to the requirement of *specific representations.* The state's representation is not specific enough in cases where the investor has merely relied on the current domestic legal framework. The Tribunal set out a higher standard, which required a "quasi-contractual" relationship between the state and the investor.[431] This means that the state must have given *specific representations* to the investor where the state has "*purposely and specifically induced the investment."*[432] The Tribunal finally disregarded the claims by the investor, as it did not find that the state had given any such specific representations or that there existed a "quasi-contractual relationship" that would have induced reasonable and justified expectations for the investor. The Tribunal made it clear that "*a claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it*."[433] While this certainly is the case, legislation and policy changes should still be "*implemented in good faith and in a non-abusive manner and that public-interest arguments will not be used as a disguise for arbitrary and discriminatory measures*."[434]

In conclusion, the requirement should not be viewed as a standalone element of the FET standard.[435] This means that a breach in itself cannot lead to a violation of the FET standard. Instead, the investor's legitimate expectations must always be coupled with concrete damages that have been caused to the investor. The element has several preconditions, which are not easily met. When determining whether the element has been fulfilled, the most important aspects to recognize are the requirement that the representations are *specific* and that the expectations are *legitimate.* This excludes both general commitments made by the host state and expectations by the investor that are unreasonable considering the circumstances. The specific representations have to be made within a "quasi-contractual relationship" existing between the host state and the investor,

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[430] Dumberry (2013), page 152.

[431] Glamis v. United States, Award, (8 June 2009), para. 766.

[432] *Id.*

[433] *Ibid.* para. 813.

[434] UNCTAD (2012), page 77

[435] Dumberry (2013), page 153.

and these representations should have *purposely induced* the investments. A breach of an investor's legitimate expectation requires a strict connection between the representations given by the state and the expectations of the investor. However, this exclusion does not apply to those scenarios where the subjective expectations of an investor have led to lost investment opportunities due to the investment climate in the host country.

6.3.1 Compliance with Contractual Obligations

In connection with the discussion on legitimate expectations, it is necessary to briefly discuss the host state's obligations to comply with contractual obligations. As mentioned in the previous chapter, the host state is obliged to respect all specific representations made to the investor. However, this leads to the question whether any breach of a term in a contract, which undoubtedly falls into the category of being specific representations, necessarily leads to a violation of the FET standard?

While a gross violation of a contract could surely mean a violation of the FET standard, *any* contractual violation by the host state does not automatically mean that it constitutes a violation of the standard.[436] This has been discussed in several cases.

The Tribunal in *Glamis* pointed out that a mere violation of a term in a contract does not constitute a breach of the investor's legitimate expectations; "something more" is required.[437] Here, the Tribunal specified that this could include denial of justice or discrimination by the state.[438] In *Mondev*, the Tribunal prohibited states from violating their obligations that they have committed themselves to in an investment contract. The Tribunal stated:

> *"Indeed a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and*

[436] Dolzer & Schreuer (2012), page 152. It is necessary to differentiate the principle of *pacta sunt servanda* and the FET standard. While any violation of a contract usually constitutes a breach of the abovementioned principle, this is not the case for the FET standard. Some authors have argued, that if this would be the case, the FET standard would be nothing less than a "*broadly interpreted umbrella clause.* Schreuer (2007), page 18

[437] Glamis v. United States, Award, (8 June 2009), para. 620.

[438] *Id.*

with contemporary standards of national and international law concerning governmental liability for contractual performance"[439]

On a closer reading, it is more probable that the Tribunal only took a stance against the state having the *prerogative* to violate investment contracts. According to the Tribunal, states do not have an *inherent* right to violate investment contracts, but a breach of contract does not necessarily lead to a violation of the FET standard. It is understandable that the Tribunal took a strong stance against this right, as it would hardly improve relations between states and investors if the Tribunal openly accepted some breaches of contract, as long as they are not severe enough. *Pacta sunt servanda* needs to be the premise for any contractual relationship, regardless if the FET standard only protects against serious violations.

This line of reasoning is similar to the conclusions reached in the *Waste Management* case, where the Tribunal excluded a simple breach of contract from the ambit of the FET standard. A contractual breach by a state violates the FET standard if it amounts to an "*outright and unjustified repudiation of the transaction."*[440]

It is clear that a contractual breach by the state has to reach some degree of severity for there to exist a violation of the FET standard. This is supported by the conclusions made by the *Glamis Gold* Tribunal that pointed out that a mere violation of a term in a contract cannot constitute a violation of an investor's legitimate expectations since a violation requires "something more." While an investor might have expectations that all the terms of the contract will be complied with, these expectations are not part of the *legitimate* expectations within the ambit of the FET standard. This is important to underline since it would otherwise be possible to argue that the investor had *legitimate expectations* that all the obligations contained in the contract would be followed and that thus any violation of the contract would constitute a breach of the FET standard. While the requirement of damages could surely mitigate these claims by the investor, it is still preferential that the element does not contain a categorical prohibition of minor breaches of contract.

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[439] Mondev v. United States, Award, (11 October 2002), para. 134.

[440] Waste Management v. Mexico, Award, (30 April 2004), para. 115.

6.4 Transparency

Transparency could be regarded as an integral requirement of the FET standard.[441] According to the UNCTAD interpretation, fair and equitable treatment requires that the investor be aware of the rules and regulations that are binding upon it. In other words, the investor should be aware of all administrative and other binding decisions that are imposed on it.[442] This means that a reference to the FET standard contains a requirement of transparency on its own. In a later amendment to its interpretation, the UNCTAD points out that while transparency is a means to avoid arbitrary and discriminatory conduct; some countries do not have the regulatory and institutional framework to make this possible.[443] To get a better conception of the element of transparency, it is necessary to look at some key cases where the issue has been discussed.

So far, only the Tribunal in *Metalclad* has found that a host state has breached the obligation of transparency, while other Tribunals have been reserved against applying it.[444] In *Metalclad,* the Tribunal found that Mexico had breached Article 1105(1) in that it had "*failed to ensure a transparent and predictable framework for Metalclad's business planning and investments*."[445] In this case, the Tribunal concluded that transparency was explicitly included in the objectives of NAFTA.[446] This award was the object of set aside proceedings at the Supreme Court of Columbia, which dismissed the case to the extent that there had been a violation of the FET standard due to lack of transparency. [447] The Court argued that there exist no obligation of transparency as contained in chapter 11.[448] Despite

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[441] Brower II (2012), page 82. For authors that disagree, see for example: Vandevelde (2010), page 83-84. Vandevelde argues that there exists no rule that would require transparency when applying the FET standard.

[442] UNCTAD (1999), page 51.

[443] UNCTAD (2012), page 72.

[444]Merrill & Ring v. Canada, Award, (31 March 2010), para. 231 and Cargill Inc. v. Mexico, Award, (18 September 2009), para. 294.

[445] Metalclad v. Mexico, Award, (30 August 2000), para. 79.

[446] *Ibid.* para. 70

[447] Supreme Court of British Columbia, United Mexican States v Metalclad Corp 2001 BCSC 655, para. 70. Justice Tysoe argued that the Tribunal had interpreted Article 1105 to include a minimum standard of transparency which did not exist; "*No authority was cited or evidence introduced to establish that transparency has become part of customary international law*", para. 68. It is debatable whether the violation of Article 1105 should have been set aside in its entirety, as the Tribunal found that Mexico had breached the obligation of due process. More on this debate, see: Dumberry (2013), page 176 & Weiler (2001), page 699-701.

[448]United Mexican States v Metalclad Corp 2001 BCSC 655, para. 73.

this, the Tribunal provided a lengthy definition of the contents of transparency, which is still useful.

In the case, the Tribunal found that transparency includes the idea that all relevant legal requirements that affect the investor should be "readily known" to the investor.[449] Transparency also obligates the host state to correct all misunderstandings or confusion related to the legal requirements if it becomes aware of such rules and regulations.[450] In the case, the Tribunal found that Mexico had violated the FET standard since the Investor had been given specific representations according to which there existed no legal basis for denying its application for a municipal construction permit.[451] Here, Mexico had failed to ensure transparency since there had existed no rules on the requirement of a permit and a complete lack of any practice or procedure on how the applications were handled.[452]

This standard puts a heavy burden on the host state, and some authors have argued that this might force administrative agencies to become "*consultative units and insurers for the implementation of foreign investment projects."*[453] Another reading on the obligation suggests that the requirement of transparency mainly refers to the procedural aspects of administrative law, and as such is more a general reiteration of the rule of law relating to the investor's procedural position in the administrative proceeding.[454] Thus, the element of transparency should not require the host state to counsel and give them comprehensive legal advice to the investor.[455]

In any event, it is doubtful whether transparency can be regarded as an obligation imposed on states based on Article 1105. As mentioned in the beginning, only *Metalclad* has found that there has been a violation of transparency within the context of Article 1105. Other tribunals, such as *Cargill* and *Merrill & Ring,* have denied that transparency exists as a stand-alone element of the FET by arguing that a general duty of transparency not be

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[449] Metalclad v. Mexico, Award, (30 August 2000), para. 76

[450] *Id.*

[451] *Ibid.* para. 88.

[452] *Id.*

[453] Schill (2010), page 169.

[454] *Id.*

[455] *Id.*

included in the customary minimum standard owed to investors trough Article 1105.[456] While the element of transparency seems to require that the host state provides the investor with the necessary information about relevant legal requirements, this obligation should not be overemphasized. It is reasonable to think that a host state cannot stand in violation of the element of transparency without there existing some other culpable behavior by the state. The lack of transparency can be regarded as a necessary consequence of situations in which the host state is already in breach of the FET standard.

7 Conclusion

The FET standard as we know it today is a product of the increased popularity of IIA. As opposed to diplomatic protection, IIA grew to become the most effective means through which foreign property could be protected. In IIA, the FET standard has developed into the most popular standards of protecting foreign investors. When interpreting the FET standard, there was some evidence that arbitrators have recourse to the VCLT. However, it is questionable whether the formal rules of interpretation increase the predictability of the standard. When interpreting and applying the FET standard, many Tribunals supported their arguments on previous awards despite the lack of any formal rules stare decisis. While this in itself does not constitute proof of consistency and predictability, it shows that Tribunals are very much aware of the general discussion concerning the standard, and as such are bound to be influenced by the *legal culture* to a certain degree.

In the context of NAFTA, there has been a clear trend towards equating the FET standard to CILMSTA. This culminated through the FTC note, which effectively put an end to speculations about the FET being "additive" to the international minimum standard. Instead, the debate turned to the question of the development of customary international law. At issue was whether it had "frozen" or "evolved" since the famous the Neer case in the 1920s. The unanimous conclusion by different Tribunals was that the acts by the host state needed to be characterized as something that is "egregious." The test for this was to apply the thought experiment in which the Tribunal analyzed the reaction by reasonable

[456] Merrill & Ring v. Canada, Award, (31 March 2010), para. 231 and Cargill Inc. v. Mexico, Award, (18 September 2009), para. 294. In his separate opinion to the *Thunderbird* award, Professor Wälde argued that transparency could only be used as guiding the process for defining the conditions of the legitimate expectations. Therefore, transparency is only relevant to the extent that it reveals whether there has been a breach of an investors legitimate expectations. Thunderbird v. Mexico, Award, (26 January 2006), Separate Opinion of Thomas Wälde, (1 December 2005), para. 36

and impartial persons. Here, the central question was whether the acts of the host state "shocked or outraged" this impartial body of people. The standard is therefore not bound by a specific time in history, as the conceptions of what shocks or outrages can change over time. There was a clear consensus that the FET standard does not protect acts that merely "raise some eyebrows" and damages that are connected to normal business risks. This test is completely in line with the Critical understanding of indeterminacy and legal culture, as the Tribunals compare the facts of each case to a general understanding of what constitutes egregious acts in the eyes of an impartial body of people.

With regards to the application of the standard, it was clear that the high threshold that was established for the standard in theory was also upheld in practice. The standard consist of many sub-elements. Most of them are not "stand alone" elements meaning that they have to be connected with another element for there to exist a breach of the standard. While the element of due process has historically been the most successful base for investor's claims, both *Mondev* and *Loewen* evidenced a strict adherence to the high threshold of the FET standard, at points almost unmercifully so.

Both cases showed that the Tribunals are aware of the political implications that an award against the host state might lead to. In *Loewen*, the Tribunal explicitly stated that it was not ready to compromise the interests and principles of the international investment community by transforming itself into an appellate instance. Similarly, the Tribunal in *Mondev* upheld the immunity arguments made by the US. The apparent legal culture, which can be evidenced throughout the abovementioned cases, seems to include a reserved attitude against applying the standard. Most Tribunals (with the apparent exceptions being *Pope & Talbot, Metalclad* and *SD Myers*) found that the threshold for the FET standard (and CILMSTA) is so high that it is only very exceptional cases, those that show obvious egregiousness, which constitutes a breach of the FET standard. The facts in the *Loewen* case gave an indication of what level the egregious actions had to reach for there to be a violation of the FET standard. As I consider myself as a somewhat of an impartial and reasonable person, I would readily have recognized the outrageous and shocking nature of the actions taken by the local court.

With regards to the element of legitimate expectations, which is purported as one of the principal weaknesses of the FET standard in the critique concerning the regulatory chill, it can be observed that this critique is not representative of the case law at hand. All awards

evidenced an adherence to a strict standard of application. Tribunals clearly underlined that investors could not legitimately expect that the host state will refrain from passing such laws that will affect its investment. Therefore, the argument that an investor could threaten host states with the remark "*see you in court*" with the aim of controlling domestic legislation does not seem like a logical strategy for the investor considering the prevailing case law.

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This thesis has concerned itself with the question of what the average person readily recognizes as unacceptable behavior. The standard is predictable if the concerned actors readily recognize the behavior that violates the FET standard. I argue that the FET standard does, in fact, constitute a codification of such behavior that is to a large extent already being acted out by most (if not all) western liberal democracies. The FET standard cannot without a serious doubt be regarded as a vague standard which enables foreign investors to threaten host states, causing a regulatory chill on legislative initiatives. The evidence provided by the extensive case law point in another direction. Therefore, I find that the legal culture of NAFTA Tribunals have indeed corresponded to that which I classify as *predictable in a good way*.

A final word should be said about the impartiality of arbitrators as well as the future for the FET standard. The chief critics towards the ISDS system, such as Van Harten, seem to base their arguments about the motivation of the arbitrators on a cynical perspective on human nature. He readily waives the possibility that some, if not the majority, of arbitrators, actually may strive for an award that is just. There is no reason why the assumption that arbitrators are biased towards investors should be more logical that the one, that their sense of justice motivates them. The necessary conclusion is that all arguments about the arbitrator's motivations have to be excluded, and the focus needs to be on the actual cases and their outcomes. As I argued at the beginning of this thesis: if the motivations are unknown, they should be inferred from the outcome of the actions. As this thesis has shown, arbitrators have been reluctant to find a breach of the FET standard by maintaining the high threshold for its applicability. In the few cases where there has been a consensus about the egregiousness, there have been clear and predictable grounds for concluding that the FET standard has been violated. Consequently, no evidence would suggest that arbitrators are biased towards investors.

Concerning the future of the FET standard, there are a few indicators as to the way into which the development is headed. If the more recent US and Canadian model BITs are taken into account, there is a clear trend towards a more rigid standard compared to the relatively open-ended formulation of fair and equitable treatment contained in Article 1105 of NAFTA. The new formulations suggest that the drafters have taken into account the "vagueness" critique. The most extreme example can be found in CETA, where the FET standard is formulated in seven paragraphs.[457] This would probably also be the result of a new potential TTIP agreement. This is can be seen a step in the right direction, as the contents of the FET standard become even more explicit and thereby hopefully adding to the predictability of the standard. However, the tradeoff with a more rigid and specific standard may be that it will lose its current quality of being adaptable to different circumstances – a quality which has been a benefit in highly complex investment disputes. In time, investment disputes stemming from CETA will show whether this is the case.

For now, there is no reason to excessively fear that investors would be able to make successful, but unfounded, claims against a host state. While it depends on who the parties appoint as arbitrators, most are likely to be motivated to find a solution that is reasonable, both for the parties as well as for the system as a whole. There is always a certain amount of uncertainty connected with investment disputes, or any dispute for that matter. Despite this, a reliable indicator of the way in which the dispute will be resolved resides within all of us; the never failing compass that directs us towards what is just and good.

[457] See Annex.

Annex

The Comprehensive and Economic Trade Agreement (CETA), Section D, Article 8.10 Treatment of investors and of covered investments:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in

judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious

belief;

(e) abusive treatment of investors, such as coercion, duress and harassment; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

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